

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 AMELIA ROSKIN-FRAZEE,

4 Plaintiff,

5 v.

17 Civ. 2032 (GBD)

6 COLUMBIA UNIVERSITY,

7 Defendant.

8 -----x
9 New York, N.Y.
August 8, 2017
11:05 a.m.

10 Before:

11 HON. GEORGE B. DANIELS,

12 District Judge

13 APPEARANCES

14 THE ZALKIN LAW FIRM

15 Attorneys for Plaintiff

16 BY: ALEXANDER S. ZALKIN

-and-

17 HANTMAN & ASSOCIATES

BY: ROBERT J. HANTMAN

18 KAPLAN & COMPANY, LLP

Attorneys for Defendant

19 BY: ROBERTA A. KAPLAN

-and-

20 PAUL WEISS RIFKIND WHARTON & GARRISON LLP

21 BY: MICHELE S. HIRSHMAN

DARREN W. JOHNSON

1 (Case called)

2 MR. ZALKIN: Good morning, your Honor, Alexander
3 Zalkin on behalf of plaintiff.

4 MR. HANTMAN: Good morning, your Honor, Robert
5 Hantman, Hantman & Associates, also for plaintiff.

6 MS. KAPLAN: Good morning, your Honor, Roberta Kaplan
7 from Kaplan & Company for Columbia University.

8 MR. JOHNSON: Good morning, your Honor, Darren Johnson
9 from Paul Weiss Rifkind Wharton & Garrison on behalf of
10 defendant Columbia University.

11 MS. HIRSHMAN: Michelle Hirshman on behalf of Paul
12 Weiss and Columbia University as cocounsel with Kaplan &
13 Company.

14 THE COURT: Good morning.

15 Why don't I start with the defense. Who wants to be
16 heard on the motion?

17 MS. KAPLAN: I would, your Honor.

18 Your Honor, if I may, I want to begin this morning by
19 acknowledging the circumstances of this case and by repeating
20 the first line of our moving brief which makes note of that
21 fact. We said in that brief that plaintiff's account of the
22 two sexual assaults that she allegedly suffered while a student
23 at Columbia is heartbreaking and indeed it is, your Honor.

24 To further respect the sensitive nature of the
25 information involved in this case, I placed a telephone call to

1 my colleague, Alex Zalkin, counsel for plaintiff, Friday
2 afternoon. And on that call I noted the fact that of the
3 exhibits that we filed, Exhibits 2 through 15 were filed under
4 seal for this reason. And both Mr. Zalkin and I agreed not to
5 reference the contents of any of those exhibits in court today
6 since this is an open courtroom open to the public and we want
7 to respect plaintiff's confidentiality and the sensitivity of
8 the issues discussed therein. And with all respect, your
9 Honor, we would hope that you could avoid getting into those
10 details as well in your questions.

11 Let me now turn to the applicable legal standard since
12 that is obviously what is most relevant today on a motion to
13 dismiss. The Supreme Court first established a private right
14 of action for students alleging violations of Title IX in the
15 case of *Davis v. Monroe County* from 1999. The *Davis* case
16 involved a fifth grade girl who was subjected to a prolonged
17 pattern of sexual harassment by the boys in her class and who
18 reported each of those incidents, but the school did nothing in
19 response.

20 In reversing the lower court decision dismissing the
21 complaint, Justice O'Connor articulated the standard that is
22 applicable here for a Title IX claim on a theory of deliberate
23 indifference, which is the theory that plaintiff is using here.
24 And that standard is as follows: Whether the actions of the
25 educational institution receiving federal funds were clearly

1 unreasonable in light of the known circumstances.

2 Moreover, your Honor, the *Davis* court made it very
3 clear, even though it sounds like a factual standard, that this
4 clearly unreasonable standard is not merely a matter of
5 evidentiary proof but is actually an independent pleading
6 standard. The Supreme Court was very clear in that opinion
7 that deliberate indifference cases can and should be dismissed
8 on the pleadings. Justice O'Connor, in fact, encouraged
9 district courts to do so at 649 of that opinion when she
10 explained that there was no reason why a court on a motion to
11 dismiss in an appropriate case should not be able to identify a
12 response as not clearly unreasonable as a matter of law.

13 Here, plaintiff concedes that she did not formally
14 report the two alleged sexual assaults to Columbia until August
15 2016, 10 months after the first alleged assault occurred. And
16 she strongly objected during that period to any investigation
17 taking place before that time. In fact, on multiple occasions
18 plaintiff stated emphatically that she did not want to report
19 her assaults, that she did not want to start an investigation,
20 that she wanted to preserve her confidentiality, and that she
21 did not want to provide Columbia with any information necessary
22 to identify her assailants. As soon as plaintiff changed her
23 mind, which happened during the summer after her freshman year,
24 and did decide to make a formal report, Columbia acted promptly
25 to investigate.

1 THE COURT: Remind me on which occasions she indicated
2 that she did not want them to investigate.

3 MS. KAPLAN: She acknowledges in her complaint that
4 she did not formally report it until that summer.

5 THE COURT: I understand that.

6 MS. KAPLAN: At paragraph 59, I believe it is, of the
7 complaint, your Honor, she told them in January '16, paragraph
8 52, that she did not want to officially report her sexual
9 assaults.

10 THE COURT: I'm sorry. You said that was --

11 MS. KAPLAN: Paragraph 52, your Honor, last sentence.

12 THE COURT: It doesn't have a date.

13 MS. KAPLAN: That was January 2016. The next
14 paragraph is February 2016.

15 THE COURT: And remind me under what context that
16 conversation --

17 MS. KAPLAN: In the previous paragraph it sets forth
18 the context. It does say it's January 2016, paragraph 51. She
19 received a call from Adrienne Blount, a case manager at
20 Columbia Student Conduct and Community Standards Office. I can
21 read the rest of the paragraph, your Honor, but the context is
22 there had been a university-wide survey that plaintiff filled
23 out. She says it was anonymous. Actually, people were named
24 in filling it out. In that survey, which actually had nothing
25 to do with these issues, she reported that she had been

1 assaulted. Columbia immediately followed up with a call from
2 Ms. Blount and on that call she even concedes that she told
3 Blount that she did not wish to officially report her sexual
4 assault, paragraph 52.

5 THE COURT: When was the conversation that you've
6 alluded to when you quoted her saying that she didn't want to
7 be contacted again about this?

8 MS. KAPLAN: That is that conversation, your Honor,
9 and that's in the exhibits that I said that I would not refer
10 to.

11 THE COURT: We are talking about the Blount
12 conversation.

13 MS. KAPLAN: Yes.

14 THE COURT: That's January of 2016.

15 MS. KAPLAN: Yes, your Honor.

16 THE COURT: Are we talking about any other indication
17 that she did not want to investigate either before January or
18 after January?

19 MS. KAPLAN: Well, she does allege in her complaint --
20 I am going to try to limit this to things that are not in the
21 exhibits for now because I said I would.

22 In her complaint she alleges a number of times in
23 which she had contacts with Columbia personnel. She talks
24 about speaking to a nurse, for example, and she makes an
25 accusation that that nurse improperly referred to her as a

1 lesbian. She makes some comments about that. She talks about
2 a conversation after that with her advisor. We are going to
3 get to that conversation in more detail.

4 In each of those conversations it's very clear that
5 she did not officially report and did not want to make a report
6 because from the complaint itself, in the complaint much later,
7 paragraph 52 says she is still saying she doesn't want to
8 officially report the assault.

9 She does not affirmatively allege prior to that point
10 that she did in any respect officially report the assault, but
11 she did not. There is no allegation in there before that that
12 she officially reported the assault to Columbia.

13 THE COURT: Give me a timeline here. The allegation
14 in the complaint, the first assault is what date?

15 MS. KAPLAN: October 5, 2015, your Honor.

16 THE COURT: And the second assault is what date?

17 MS. KAPLAN: The second assault is December 14, 2015.

18 THE COURT: December 14?

19 MS. KAPLAN: December 14, 2015.

20 THE COURT: What is the conversation with Columbia
21 between October 2015 and December 2015?

22 MS. KAPLAN: Your Honor, I thought you might ask that
23 question. I actually prepared a chart. I have not showed it
24 to my adversary. Can I show it to my adversary and then, if he
25 concedes, show it to your Honor?

1 THE COURT: Sure.

2 MS. KAPLAN: May I approach, your Honor.

3 THE COURT: Yes.

4 MS. KAPLAN: Your Honor, the two alleged assaults show
5 up here on October 5 and December 14, 2015. You'll see that
6 there is a third column, type of resource, and that's very key
7 because under both DOE laws and regulations and Columbia's own
8 policies, certain people that plaintiff spoke to, like the
9 nurse on the sexual violence hotline, have an obligation, if
10 plaintiff so requests, which she did here, to keep any
11 information she can base it on confidential.

12 We have noted in the third column over which contacts
13 were confidential resources pursuant to the guidelines and
14 pursuant to, and I'll talk about this more, Columbia's policies
15 with respect to sexual assault on campus and which were not,
16 and then I am going to focus in quite specifically on the two
17 that were not, which plaintiff focuses on in her brief and in
18 her complaint.

19 THE COURT: We have the October 5 first alleged
20 assault on your chart and then on October 12 you say that she
21 went to the medical service, but between October 5 and October
22 12, there was no either report or medical treatment sought with
23 regard to the first.

24 MS. KAPLAN: That's as far as we know, your Honor, and
25 as far as plaintiff alleges, yes.

1 THE COURT: Then on October 13 she calls the hotline.

2 MS. KAPLAN: Correct.

3 THE COURT: And in response to that they say they will
4 have someone contact her and someone calls back on October 14.

5 MS. KAPLAN: Correct. Again, without disclosing
6 details. That's Exhibit 15.

7 THE COURT: You say October 14 is the first time she
8 indicated that she did not want to report the assault.

9 MS. KAPLAN: No. She indicated that to the SVR, the
10 nurse on the SVR hotline.

11 THE COURT: On October 13 and October 14 you say that
12 she indicated to the hotline person and the staff advocate that
13 she did not want to report the assault.

14 MS. KAPLAN: That's correct, your Honor. Again, if
15 I'm focusing solely on allegations in the complaint, she does
16 not allege that she did do that.

17 THE COURT: You had three boxes after October 14.
18 Does that mean all those things happened on October 14?

19 MS. KAPLAN: No. I'm getting a nod from my very
20 knowledgeable colleague nodding yes.

21 THE COURT: On the same day she goes to counseling and
22 the psychological services office and speaks to the academic
23 advisor.

24 MS. KAPLAN: Yes. I am going to come back to that,
25 your Honor, because there are only two times, as I understand

1 her argument, that she says she said something that would have
2 constituted the kind of notice or report that should have
3 provoked Columbia to nevertheless do something, frankly,
4 against her wishes, and those two are the discussion with her
5 academic advisor that you just referred to and a later
6 conversation with the executive vice-president for University
7 Life.

8 THE COURT: But you don't claim the discussion with
9 the advisor was a discussion about the assault.

10 MS. KAPLAN: Correct.

11 THE COURT: You say that that was a discussion about
12 some academic accommodation.

13 MS. KAPLAN: Correct. I can tell you what she says in
14 her complaint, your Honor, and I think her words are very
15 carefully chosen. And in her complaint the most she says about
16 this meeting is that she strongly alluded, strongly alluded to
17 that something had happened. I believe that's paragraph 22,
18 your Honor. Let me doublecheck. No. I apologize. That's
19 paragraph 39, your Honor.

20 THE COURT: Without explicitly saying that she was
21 raped, plaintiff strongly alluded to the advisor that plaintiff
22 had been raped.

23 MS. KAPLAN: I want to keep to my promise to counsel.
24 We have provided the documentation on that in the exhibits
25 filed under seal.

1 THE COURT: Give me a little bit more detail about
2 this December 3 meeting with the student advocate. Is this
3 some kind of forum?

4 MS. KAPLAN: Yes.

5 THE COURT: Some kind of faculty/student discussion
6 group? How do you characterize this?

7 MS. KAPLAN: Let me give you the context. The
8 executive vice-president for the University Life at Columbia is
9 a person who has been charged officially with dealing with this
10 issue, among other issues on campus, including Columbia's Title
11 IX policies and procedures and how Columbia deals with that and
12 improvements, what can be done. Columbia revises its policies
13 almost every year, things like that. That is among the
14 policies that the executive vice-president for student life is
15 responsible for.

16 And plaintiff, and I think you can see this in her
17 complaint, is an advocate in this group. The main group at
18 Columbia is called No Red Tape, student activists about sexual
19 assaults on campus, and she is very involved in that group.
20 There was a meeting. They have periodic meetings between a
21 whole bunch of students and the executive vice-president of
22 University Life, in which plaintiff attended, to discuss
23 precisely those issues. There, for lack of a fancier term,
24 their complaint, their beefs with the way Columbia handles
25 these issues on campus --

1 THE COURT: How large a meeting is this?

2 MS. KAPLAN: My understanding, there were several
3 students there, and she doesn't contest that.

4 THE COURT: So at this meeting --

5 MS. KAPLAN: She says in her complaint several other
6 student advocacy organization members. Paragraph 44, your
7 Honor.

8 THE COURT: At this meeting she indicated that she had
9 been raped?

10 MS. KAPLAN: Correct. That's what she alleges.

11 THE COURT: That was December 3. At that point she
12 would be referring to the October 5.

13 MS. KAPLAN: Correct, your Honor. Logically, that's
14 what she would have meant.

15 THE COURT: Then December 14 was the second assault.

16 MS. KAPLAN: Correct, your Honor.

17 THE COURT: And on the next day she goes to St. Luke's
18 Hospital for treatment of her injuries and rape kit.

19 MS. KAPLAN: Correct, your Honor.

20 THE COURT: Now, let's get back to where you started,
21 the January 19 phone call. The January 19 phone call was a
22 phone call initiated by Ms. Blount, the case manager.

23 MS. KAPLAN: Correct, your Honor.

24 THE COURT: Because she saw a survey that was
25 submitted.

1 MS. KAPLAN: Um-hum.

2 THE COURT: And that survey was submitted relative to
3 what? Is that in conjunction with this December 3 meeting?

4 MS. KAPLAN: Totally unrelated. It was a
5 university-wide survey. It was actually, as I understand it,
6 in connection with Columbia's accreditation process. It had
7 nothing to do with Title IX or sexual assaults on campus.

8 THE COURT: When was this survey filled out?

9 MS. KAPLAN: Shortly before that, your Honor. I can
10 get you the date.

11 THE COURT: You think in January?

12 MS. KAPLAN: Yeah. That's my understanding.

13 THE COURT: Ms. Blount sees the survey.

14 MS. KAPLAN: And that, from Columbia's perspective,
15 her name is on the survey. She is actually incorrect in
16 alleging here that it was anonymous. Her name actually was on
17 it. That's the first time that Columbia had a nonconfidential
18 communication to Columbia specifically alleging these assaults.
19 I can get back to the executive vice-president meeting and why
20 that doesn't count in a second.

21 In response, Columbia followed up immediately with
22 this call.

23 THE COURT: They called her, Ms. Blount called her,
24 and the plaintiff had described which incident, both incidents?

25 MS. KAPLAN: It says sexual assaults. Again, I'm

1 trying not to get into the exhibits, but there is no
2 description.

3 THE COURT: It doesn't say, I was assaulted on October
4 5 and/or December 4. Is there some kind of box that's checked?

5 MS. KAPLAN: No. She actually wrote it in because
6 it's not pertinent to anything that's in this --

7 THE COURT: The information she provided on the survey
8 was that she had been -- what was described? What information
9 did she provide then?

10 MS. KAPLAN: That she had been sexually assaulted.

11 THE COURT: They contacted her in response to this
12 information on the survey, Ms. Blount.

13 MS. KAPLAN: Correct.

14 THE COURT: In that conversation, on January 19, that
15 was when she indicated that she did not want to officially
16 report the assaults.

17 MS. KAPLAN: Correct. That's based on her allegation.

18 THE COURT: She also indicated to them that she did
19 not want them to contact her again about those assaults?

20 MS. KAPLAN: That's correct, your Honor. That's based
21 on the document that we submitted. What she says is that she
22 didn't want them to contact her ever again.

23 THE COURT: And then the next communication about
24 these incidents was not until August 5, when she made a formal
25 what? What did she do?

1 MS. KAPLAN: She made a formal report.

2 THE COURT: I don't know what that means.

3 MS. KAPLAN: I believe it was by e-mail. Again, I'm
4 trying to avoid the exhibits. She did make a formal
5 communication to Columbia that she now wanted to formally
6 report.

7 THE COURT: I'm just trying to understand. That
8 triggers what? What does a formal report mean and --

9 MS. KAPLAN: What that meant, given this context, is
10 that not only did she want Columbia to go forward with an
11 investigation, but, critically, she was willing to cooperate
12 with that investigation. This was very important because the
13 first time Columbia is aware of any of the details, your Honor
14 just referred to that, any of the details of what she alleges
15 happened to her, where it happened, how it happened, etc., was
16 not until that summer, late that summer, and then her official
17 interview happens pretty soon after she comes back to campus in
18 September.

19 THE COURT: The thing you don't have on this chart is
20 that they began an investigation on September 8.

21 MS. KAPLAN: Yes, I believe that's correct, your
22 Honor.

23 THE COURT: Now we are talking about 2016. And that
24 investigation entailed what?

25 MS. KAPLAN: Interviewing plaintiff. As I recall,

1 there was a request to speak to others who might be witnesses
2 or might have information. She said that there were no such
3 people and she did not want her roommates to be contacted.

4 There are some allegations about some evidence, some notes that
5 she alleges the assailant posted in the dorm and they asked for
6 those notes and she told them she had thrown them away.

7 There is some other evidence -- again, I'm trying to
8 avoid any details here, and I apologize, your Honor -- about
9 how the second assault was conducted, and they asked if she had
10 any of those things and she was told that, no, she had
11 thrown -- she told them that, no, she had thrown all those
12 away.

13 They looked at the swipe records for people who had
14 swiped into the dorms during the relevant periods. One of the
15 problems here, your Honor, is that there are three dorms that
16 are all interconnected, so anyone could come into any one of
17 the three dorms and it get access to where her suite was.
18 There were thousands of entries on those forms.

19 The description that she gave of her assailant, which
20 is in the complaint, your Honor, is that he had wavy hair,
21 short, wavy, dark hair and was somewhere in the nature of five
22 foot six to six feet tall and that's all she could describe.
23 So given that information, there was really nothing that could
24 be done with the swipe records because that's too little detail
25 to try to identify 3,000 people on swipe records. And the

1 video of the thing that she seems to have been most concerned,
2 most upset about, is that the video of people going into the
3 dorms by that point had been erased, so there was -- not
4 erased, but written over, so there was no video.

5 THE COURT: What's the retention policy on that, three
6 months, six months?

7 MS. KAPLAN: I don't know the retention period, but it
8 was past the retention period.

9 THE COURT: I have also --

10 MS. KAPLAN: I'm sad to say, your Honor, that with
11 respect to these alleged assaults, assuming they occurred, that
12 the person was not able to be found, given what she could
13 provide and given the lapse in time.

14 THE COURT: So I also have, after the formal report on
15 August 5, an investigation was initiated September 8.

16 MS. KAPLAN: Yes. I think that's when she came and
17 had the first interview.

18 THE COURT: And on September 9 she asked that locks be
19 placed on her suite.

20 MS. KAPLAN: Locks, yes, your Honor.

21 THE COURT: And then on September 16 Columbia offered
22 to put the locks on the suite or give an off-campus apartment.

23 MS. KAPLAN: That's correct, your Honor. And she
24 chose to have the locks on her suite.

25 THE COURT: Those were done when?

1 MS. KAPLAN: I think promptly thereafter. I don't see
2 any allegation from her that there was some undue delay on that
3 point.

4 THE COURT: Then October 17 the report was completed,
5 the investigative report.

6 MS. KAPLAN: Yes, your Honor.

7 THE COURT: Do I have that right?

8 I have also that there was some sort of housing
9 accommodation on December 9. Was that an off-campus apartment
10 or lock on the suite?

11 MS. KAPLAN: I don't know, your Honor, but I can check
12 while my adversary is speaking.

13 THE COURT: I'm referencing paragraph 67 of the
14 complaint.

15 MS. KAPLAN: I don't think Columbia -- I can't give
16 you the details, but I don't think we would deny that she
17 requested the housing accommodation as it says here on
18 September 9. She was given the housing accommodation. I don't
19 have the details about what that was, your Honor. I apologize.

20 THE COURT: Go ahead. Continue.

21 MS. KAPLAN: Given kind of just what we went through,
22 your Honor, the chronology that your Honor helpfully outlined,
23 we believe that this case, while, as I said, heartbreaking,
24 presents a narrow question, actually, that we believe is fully
25 capable of being resolved by this Court on this motion to

1 dismiss: Mainly, does the university act in a manner that
2 could possibly be construed as clearly unreasonable when it
3 respects a college student's repeated knowing unambiguous
4 requests and refusals, either for the university to investigate
5 or to cooperate with such investigation and indeed in
6 circumstances where any meaningful investigation would have
7 been impossible without the student's cooperation.

8 We believe, your Honor, that the only answer to this
9 question is no. Given the facts as pleaded in the complaint,
10 it could not have been clearly unreasonable for Columbia to
11 respect plaintiff's wishes that she did not want to report the
12 alleged assault or for there to be an investigation.

13 Indeed, the fact that Columbia did conduct such an
14 investigation almost as soon as plaintiff reported it, as
15 plaintiff concedes, and we looked at those paragraphs,
16 paragraph 56 and 58, is itself proof that it was not
17 deliberately indifferent to her needs.

18 In fact, I think it's important in this case, your
19 Honor, to take a step back and try to eliminate the benefit of
20 hindsight. It is important to understand that without
21 plaintiff being willing to disclose the details of the alleged
22 assaults, as she did not do until August 2016, it was all but
23 impossible for Columbia to conduct a meaningful investigation
24 or to know what happened, how it happened or where it happened
25 and, therefore, there is no way that Columbia's conduct could

1 be clearly unreasonable under the circumstances.

2 Let me kind of go through the underlying, if I could
3 your Honor, the DOE, the federal law and guidance and why
4 Columbia has these policies and why they exist.

5 The federal guidance from the DOE office of civil
6 rights, OCR, repeatedly emphasizes the importance of honoring a
7 student's refusal to disclose a sexual assault or to
8 participate in an investigation. Columbia's policies mirror
9 this guidance, as they must, as a recipient of federal funds,
10 and there are strong public policy considerations underlying
11 these policies as well.

12 Let me start with the federal guidelines. They come
13 from two sources: The dear colleague letter from 2011 and the
14 questions and answers on Title IX and sexual violence from
15 2014, both of which plaintiff actually attached to her
16 complaint.

17 The dear colleague letter from 2011 says as follows:
18 Schools should inform and obtain consent from the complainant
19 before beginning an investigation. If the complainant requests
20 confidentiality or asks that the complaint not be pursued, the
21 school should take all reasonable steps to investigate and
22 respond to the complaint consistent with the request for
23 confidentiality or request not to pursue an investigation. If
24 a complainant insists that his or her name or other
25 identifiable information not be disclosed, the school should

1 inform the claimant that its ability to respond may be limited.

2 Similarly, in the questions and answers from 2014, the
3 DOE said as follows: OCR strongly supports a student's
4 interest in confidentiality in cases involving sexual violence.
5 There are situations in which a school must override a
6 student's request for confidentiality in order to meet its
7 Title IX obligations. However, these instances will be
8 limited.

9 Let me turn, your Honor, now, if I may, to Columbia's
10 policies, which, as I said, mirror this federal guidance.
11 Columbia's policies say the following: If a student wishes to
12 maintain confidentiality, a nonconfidential resource will
13 direct the student to confidential resources, which is some of
14 those early communications that we talked about, which will not
15 report without the student's permission. A student may choose
16 to make a full report or request confidentiality as he or she
17 determines. That's at page 9 of the Columbia policies.

18 Same page: A student who reports gender-based
19 misconduct to the Columbia's gender-based misconduct office can
20 request that the office not disclose his or her identity to
21 anyone else, including the person who allegedly committed the
22 misconduct. Such a request may limit the ability to
23 investigate and respond.

24 Let me turn to the reasons why these policies I just
25 read to your Honor exist. The reason, and I am going to tell

1 you that this comes from federal guidance, is that the policy
2 makers and the Federal Government have concluded that the
3 interests of a student who has been victimized or allegedly
4 victimized in confidentiality has to be of utmost concern.

5 Here is what the OCR guidance said. It says: A
6 school should be aware that disregarding requests for
7 confidentiality can have a chilling effect and discourage other
8 students from reporting sexual violence. To improve trust in
9 the process for investigating sexual violence complaints, a
10 school must take steps to protect the complainant as necessary.

11 Moreover, the student advocacy organization, called No
12 Red Tape, of which plaintiff is a member, emphasizes the goal
13 of empowering survivors and allowing survivors to control the
14 process. Indeed, in its very first statement of values, No Red
15 Tape states that members of firm actively support every
16 survivor's right to seek justice in healing in the way that
17 they choose. The work we do is always centered on the needs
18 and experiences of survivors themselves.

19 Finally, your Honor, we cited in our brief, plaintiff
20 herself wrote a blog post that she published on Huffington Post
21 on June 6, 2016, so the same summer that she changed her mind
22 and formally reported a month or so later, the blog post is
23 called Why We Don't Report It. And she says, with respect to
24 her own decision, I don't report it because it's not best for
25 me. Reporting is detrimental to my well-being and I have no

1 obligations to do anything after an assault that doesn't have
2 my best interests and only my best interests at heart.

3 Your Honor, the fundamental premise or core of
4 plaintiff's thesis in this case is that in order for this case
5 to proceed is that somehow Columbia had an obligation under
6 Title IX to override plaintiff's wishes. That on its own would
7 be quite a hurdle for your Honor for her to make, without the
8 federal guidance and policies that make it very clear that when
9 a complainant takes the kind of position that this plaintiff
10 took, there is grave concern about protecting that person's
11 confidentiality and not pushing a complainant to do something
12 that they are not comfortable with. And then indeed here you
13 have the very practical, what I call the hindsight problem,
14 which is, given the nature of these alleged offenses, without
15 plaintiff being willing to explain to someone at Columbia in a
16 nonconfidential way when it happened, where it happened, how it
17 happened, I would submit, your Honor, as a practical matter
18 there was absolutely nothing that Columbia could have done.

19 THE COURT: How was that policy communicated to the
20 student body and university community?

21 MS. KAPLAN: It's communicated in the policies that we
22 attach as Exhibit 1. It's the only nonconfidential exhibit I
23 submitted to your Honor. It's fully available to every student
24 and the students in this No Red Tape group, like plaintiff,
25 were very, very familiar with. If you look at the

1 documentation, the confidential documentation that we submitted
2 under seal, she says over and over again how familiar she was
3 with the policies.

4 THE COURT: Is there any either written or oral
5 communication to the student who indicates that they are
6 reluctant to move forward with an investigation, what the
7 consequences of that reluctance --

8 MS. KAPLAN: Yes, there is. There is a written policy
9 that says if a student is reluctant to go forward, that's going
10 to have a great -- I just talked about it. We cite it in our
11 brief. That will have an adverse impact on Columbia's ability
12 to investigate, which is exactly what the DOE's regulations
13 state.

14 THE COURT: If a student in the abstract says I've
15 been sexually assaulted, I want to let you know about it, but I
16 don't want to initiate a formal investigation. What's the
17 student told about what that would mean?

18 MS. KAPLAN: The policy itself says that that could
19 hamper an investigation.

20 THE COURT: I know. What does that mean? To hamper
21 an investigation doesn't tell me whether or not you are going
22 to do an investigation.

23 MS. KAPLAN: She was never told here that Columbia was
24 going to seek to override by Columbia those wishes and, again,
25 as I said, without knowing more, I don't know how Columbia

1 could have. You have to contrast the facts alleged here.

2 THE COURT: Columbia could have done a number of
3 things, not just for her benefit, but for the benefit of all
4 students. If someone reports a series of sexual assaults at a
5 certain location when obviously Columbia would have some
6 interest, even if that particular student doesn't want their
7 own individual situation to be revealed, the university would
8 have an interest in making sure that that location is a safe
9 location for all the students.

10 MS. KAPLAN: That didn't happen in a nonconfidential
11 way, your Honor, until August, when Columbia officially started
12 investigating.

13 THE COURT: It didn't happen, but it's not to say it
14 couldn't have happened.

15 MS. KAPLAN: It could have happened. If she had sat
16 down with someone in a nonconfidential way and explained what
17 she said in August to Columbia officially, I think Columbia
18 would have probably tried to do something about it.

19 THE COURT: I assume that if Columbia had gotten
20 reports from 10 different students that they were at a certain
21 location on the campus and they all were sexually assaulted by
22 some individual that they described, that regardless of their
23 wishes to not do an individual formal investigation, Columbia
24 would take its own action to ensure that other students aren't
25 sexually assaulted.

1 MS. KAPLAN: Absolutely, your Honor. DOE guidance and
2 Columbia's policies provide for that and absolutely in today's
3 world, your Honor -- these things make me feel old, I'm sad to
4 say -- and a lot of these instances and some of the cases I am
5 going to refer your Honor to, people actually take videotapes
6 of assaults where you have pictures of people and things can be
7 investigated from that and are and, heaven forbid and God
8 forbid, if it was a picture of Columbia or video of Columbia, I
9 am sure we would have done something.

10 This is where the hindsight problem comes in here.
11 Until she did that survey where she said there are two assaults
12 without any information about where, how, when, etc., Columbia
13 had no information that it was clear from all the
14 accommodations that she was asking for that something had
15 happened to her, she believed something had happened to her.
16 But she refused to give Columbia details about that.

17 This is really one of those scenarios where I am not
18 sure that -- Columbia had, A, no way of knowing there was a
19 danger or a potential danger on campus, allegedly; and, B,
20 without that information, I am not sure what they could have
21 done in the circumstances. Surely there are circumstances
22 where public safety concerns would override that based on the
23 notice that was given and what the university knew. The
24 hypothetical your Honor posited certainly would have provoked
25 that. As I said, there is all kinds of cases in the case law

1 about Instagram and videotapes and all kind of stuff that I
2 honestly can't imagine this world would ever get to that point,
3 but it has. In those circumstances of course a college or
4 university should follow up.

5 THE COURT: At what point do you say that the
6 university received specifics or detail about the two --

7 MS. KAPLAN: I don't think that's in dispute, your
8 Honor, not until that summer in 2016.

9 THE COURT: Not until that August?

10 MS. KAPLAN: No.

11 THE COURT: Even the survey didn't give any detail --

12 MS. KAPLAN: I am going to try to provide the detail,
13 your Honor, on the break. As I recall, it just said sexually
14 assaulted. It's like a one-sentence handwritten thing.

15 THE COURT: You think that those were the words used,
16 sexually assaulted?

17 MS. KAPLAN: I believe so. I want to double check.

18 THE COURT: And no other description. Did it give the
19 date?

20 MS. KAPLAN: No.

21 THE COURT: And place where this occurred?

22 MS. KAPLAN: No. That I'm sure.

23 THE COURT: Just in general made reference to, I had
24 been sexually assaulted.

25 MS. KAPLAN: Correct. There is a follow-up in January

1 and on the follow-up she says, I don't want to officially
2 report. And you have the document where she says, don't ever
3 contact me.

4 She does have two contacts. In her case she has two
5 potential communications which she alleges should have provoked
6 Columbia to do the kinds of things your Honor is suggesting. I
7 want to deal with both of those specifically, if I may, your
8 Honor. We have already dealt with them somewhat.

9 The first is her meeting with her advisor on October
10 14, 2015. As I said, the complaint in general is carefully
11 worded. There she pleads -- the best she is able to plead is
12 she that strongly alluded to advisor. We are living in a world
13 of *Iqbal* and *Twombly* and in that regime, your Honor, if she had
14 said to her advisor I was raped, we don't think that it's
15 plausible to assume she would have only alleged that she
16 strongly alluded to. It's almost a suggestion or admission
17 that she not give the advisor enough to know what had happened.

18 Moreover, the advisor's response -- in other words,
19 under *Iqbal* it would be implausible to read plaintiff's words
20 to mean that she somehow said something much more specific than
21 she alleges in the complaint.

22 THE COURT: You're merging two different
23 conversations. The October 13 she called the hotline.

24 MS. KAPLAN: Yes.

25 THE COURT: She calls the hotline and says what?

1 MS. KAPLAN: That you have, your Honor, but that was a
2 confidential communication that cannot be reported without her
3 permission, and she doesn't even allege that anything should
4 have been done as a result of that.

5 THE COURT: The way you characterize it here is
6 incomplete. You say: Plaintiff calls the sexual violence
7 response hotline but does not want to report the alleged
8 assault.

9 MS. KAPLAN: Right.

10 THE COURT: That couldn't have been the conversation.

11 MS. KAPLAN: No. You have the conversation, your
12 Honor. It's in the exhibits. Exhibit 2, your Honor. Again,
13 we are in an open courtroom.

14 THE COURT: That's fine. I am just trying to figure
15 out what you're alluding to when you said -- let me just put it
16 to you this way.

17 MS. KAPLAN: Your Honor, I apologize. It's Exhibit 4.

18 THE COURT: I assume that what you are doing by this
19 outline is saying that on October 13, she informed them on the
20 hotline that she had been sexually assaulted.

21 MS. KAPLAN: Yes. But that's a confidential -- that's
22 a rape crisis hotline.

23 THE COURT: I understand that. I'm just talking from
24 common sense. If she calls the sexual violence response
25 hotline, but does not want to report the alleged assault, one

1 can only assume that she called the hotline to report the
2 assault. And what you are trying to say is that she called the
3 hotline, but she indicated that she didn't want to report it,
4 so she asked for some sort of confidential consult.

5 MS. KAPLAN: Your Honor, I'm uncomfortable. If you
6 look at page 5 of the document, she says: I'm not reporting
7 it. But I have an agreement --

8 THE COURT: I understand that. I'm just going off the
9 chart you gave me. The chart you gave me is a public document
10 and you say the plaintiff calls the sexual violence response
11 hotline but does not want to report the alleged assault. I
12 don't know what kind of conversation that's alluding to because
13 the only thing you say is that she said to them, she didn't
14 want to report --

15 MS. KAPLAN: Your Honor, she doesn't allege that she
16 reported it on that hotline for purposes of starting any of
17 these proceedings.

18 THE COURT: I know. You are going to get into a
19 dispute about whether or not -- you say that she has to report
20 it for a purpose and they argue that she just has to report it.

21 MS. KAPLAN: No, no, no. If she reports it to certain
22 sources, if you look at the chart, who are confidential
23 sources, like rape hotline nurses, those people are not
24 permitted to tell anyone else without her permission and she
25 does not argue otherwise.

1 The only two things that she says Columbia should have
2 followed up on -- she is not ever arguing that Columbia should
3 have followed up on this. The only two things that she said
4 Columbia should have followed up on before the summer of 2016
5 is the meeting with her advisor and the meeting with the
6 executive vice-president of student life, only two things.
7 That's because, again, she is an expert on these things. She
8 understands and knows that these other things are all
9 statutorily designated as confidential, and she did not give
10 anyone permission to disclose.

11 THE COURT: Is there something in the complaint that
12 alludes to this sexual violence response hotline conversation?

13 MS. KAPLAN: I believe there is, your Honor. It's
14 paragraph 32.

15 THE COURT: Paragraph 32. That's what I alluded to.
16 This isn't confidential. It says: Plaintiff reported that she
17 had been raped. It says: In response to plaintiff's report
18 that she had been raped. That's what the complaint says. The
19 complaint says that she called the hotline. And then in
20 response to a report that she had been raped she was advised
21 that she could report it to the police. That's what the
22 complaint says.

23 MS. KAPLAN: Yes. But she does not argue in her
24 papers, nor could she, that that report on October 13 to the
25 sexual violence hotline, which is statutorily protected, could

1 have or would have caused anyone at Columbia to do anything.

2 THE COURT: That would not have initiated an
3 investigation because the hotline is a confidential hotline.

4 MS. KAPLAN: Correct.

5 THE COURT: And people who call the hotline don't
6 expect you to disclose it to other individuals, not even the
7 university official.

8 MS. KAPLAN: Correct.

9 THE COURT: Without your permission.

10 MS. KAPLAN: You have the transcript of what she said
11 and she clearly did not agree.

12 THE COURT: Is there a reference to this October 14
13 call in the complaint?

14 MS. KAPLAN: Yes. It's paragraph 39.

15 THE COURT: That's why I'm confused because I can't
16 really reconcile the facts in the complaint as alleged and in
17 your chart as alleged because in the complaint 32 says that she
18 gave a report that she had been raped. That's what it says.
19 It says in response to plaintiff's report that she had been
20 raped.

21 MS. KAPLAN: That's like the rape crisis hotline.

22 THE COURT: That is the sexual violence response
23 hotline.

24 MS. KAPLAN: Right.

25 THE COURT: She said she had been raped.

1 MS. KAPLAN: Correct.

2 THE COURT: In 32.

3 MS. KAPLAN: Correct.

4 THE COURT: In 39 it says that she did not explicitly
5 say that she had been raped.

6 MS. KAPLAN: The difference, your Honor, is who she is
7 talking to.

8 THE COURT: Am I supposed to read your chart in this
9 complaint as indicating that on October 13, when she called the
10 hotline, she said that she had been raped, but when the person
11 called her the next day, she did not say she had been raped?

12 MS. KAPLAN: No. That's a different communication.

13 THE COURT: I know it's a different communication.

14 MS. KAPLAN: The communication with the hotline -- I
15 am going to tell you the exhibit numbers and you can read them.
16 Again, I am going to try to honor my agreement. The call with
17 the hotline is Exhibit 4. The call right after, the
18 communication, the follow-up after the hotline is Exhibit 15.
19 Both of those are confidential people who do not have
20 permission to report what is said to them unless she gives them
21 permission to do so.

22 THE COURT: I understand that. But I'm trying to
23 understand --

24 MS. KAPLAN: That's different from the conversation
25 with her advisor, who was not such a confidential person.

1 THE COURT: I understand all that perfectly. I'm just
2 saying that on the conversation on the 13th, it says that she
3 has reported a rape. In paragraph 32.

4 MS. KAPLAN: Maybe this is the confusion, your Honor.
5 When we use the word report on here, she uses the word herself
6 in the conversation, we report it for purposes of Title IX.

7 THE COURT: I understand that. But she said she had
8 been raped.

9 MS. KAPLAN: But it was not a report for purposes of
10 Title IX.

11 THE COURT: I understand that, and I am not debating
12 it. I am just trying to get the facts. On the 13th she had a
13 conversation with someone and in that conversation she
14 indicated on that hotline that she had been raped.

15 MS. KAPLAN: But does not want to report it.

16 THE COURT: Again, don't advocate it right now. I'm
17 just trying to get the facts. She said she had been raped.
18 The next day, when the person called her back to discuss it
19 with her, in paragraph 39, it says that she did not explicitly
20 say --

21 MS. KAPLAN: That's a different person, your Honor.
22 There are three people. There is the rape crisis hotline nurse
23 is the first person. Then there is the person who follows up
24 from the rape crisis hotline nurse, who is a rape crisis
25 counselor. Those are both confidential. Then there is her

1 academic advisor, who is not part of that process at all. She
2 is just sort of an academic advisor. The academic advisor is
3 the person that she allegedly she strongly alluded to.

4 THE COURT: This is referencing the academic advisor
5 rather than the staff advocate?

6 MS. KAPLAN: When you say this, your Honor, what are
7 you referring to?

8 THE COURT: I'm referring to paragraph 39.

9 MS. KAPLAN: Paragraph 39 is referring to her academic
10 advisor, correct.

11 THE COURT: That's not, the staff advocate called me.

12 MS. KAPLAN: Correct.

13 THE COURT: That's what I'm trying to understand.

14 MS. KAPLAN: I apologize.

15 THE COURT: The reason why I'm confused is because
16 those are three different calls and you only have two calls on
17 your chart.

18 MS. KAPLAN: We have all three. They are just on
19 different dates, but we have all three. We have the sexual
20 violence response hotline on October 13, we have the call to
21 Barbacane on October 14.

22 THE COURT: Right.

23 MS. KAPLAN: And we have, reaches out to her academic
24 advisor, and you skip a box and go to the next box.

25 THE COURT: The plaintiff reaches out to her academic

1 advisor. That box is the October 14, second conversation with
2 someone different than the staff advocate.

3 MS. KAPLAN: Different than the nurse. But the first
4 person she alleges she spoke to who was not under
5 confidentiality obligations.

6 THE COURT: What you are trying to point out is that
7 in the confidential hotline conversation she may have called
8 the hotline and talked to them about a rape. But the day that
9 she spoke to the academic advisor she may have discussed with
10 the staff advocate a rape, but she did not say to the academic
11 advisor that same day that she was raped.

12 MS. KAPLAN: Correct, your Honor.

13 THE COURT: You are saying she had the confidential
14 conversation with the hotline, the initial call to the hotline,
15 and then they call back to her where she discusses the rape in
16 confidence with the hotline. But when she reached out to her
17 academic advisor, she did not mention her rape.

18 MS. KAPLAN: Correct.

19 THE COURT: I'm trying to understand, in what way was
20 the conversation with the academic advisor a conversation
21 about -- was that just an academic conversation or was that a
22 conversation about her being sexually assaulted?

23 MS. KAPLAN: It was about accommodations.

24 THE COURT: That's what I'm trying to say.
25 Accommodation for what reason?

1 MS. KAPLAN: Turning in papers late, missing classes.

2 THE COURT: Not accommodation about changing the locks
3 or moving to another --

4 MS. KAPLAN: Correct.

5 THE COURT: That's where I'm confused. When you talk
6 about accommodation, mostly we are talking about whether they
7 accommodated her request to put the locks --

8 MS. KAPLAN: There are two categories, academic and
9 housing.

10 THE COURT: The academic conversation you say had
11 absolutely nothing to do nor did she disclose that she had been
12 sexually assaulted to the academic --

13 MS. KAPLAN: She was asking for accommodations. When
14 students ask for accommodations, often they are asking for them
15 because something happened to her.

16 THE COURT: Not the way you just said. You said
17 something about the paper was due. If I'm in college and I
18 have a late paper, it doesn't have anything to do with a sexual
19 assault. It means I just didn't do my paper. If someone said,
20 my paper is due next Monday, but I can't have it to you until
21 Tuesday, why would anybody think that's a conversation about
22 sexual assault?

23 MS. KAPLAN: Plaintiff told Columbia when she applied
24 to Columbia she had been sexually assaulted in high school, and
25 she was very involved in this and was very clearly deeply

1 involved in these issues. She asked for accommodations. She
2 clearly was concerned and upset. The advisor gave her those
3 accommodations.

4 THE COURT: That's what I'm trying to understand. She
5 asked for an accommodation. What kind of an accommodation did
6 she ask for and what reason did she give for that
7 accommodation?

8 MS. KAPLAN: They were medical accommodations and they
9 were relating to her academic tests, getting -- the document is
10 in here. I'm trying to limit this.

11 THE COURT: I don't understand in what way that was a
12 conversation about being raped.

13 MS. KAPLAN: It wasn't.

14 THE COURT: In what way was that a conversation about
15 being sexually assaulted in any way?

16 MS. KAPLAN: It wasn't other than she pleads that she
17 strongly alluded to. You have the documentation and she
18 doesn't say that.

19 THE COURT: You just confused me when you said, when
20 people ask for accommodations they assume it had something to
21 do with a sexual assault.

22 MS. KAPLAN: What I'm saying is, that's one of the
23 reasons people can ask for accommodations, but she does not say
24 I was sexually assaulted; therefore, I want these
25 accommodations.

1 THE COURT: Was it understood between the two people
2 in the conversation that she was asking for an accommodation
3 because she had been assaulted?

4 MS. KAPLAN: I think it was understood that she was
5 asking for accommodations because she was in a bad way, but
6 there were no details about why she was in a bad way is the way
7 I would put it.

8 THE COURT: Why would somebody assume she is in a bad
9 way because she had been recently sexually assaulted?

10 MS. KAPLAN: I agree. I don't think that's a fair
11 inference. That's precisely our argument, your Honor. I don't
12 think under *Iqbal* and *Twombly* that's plausible. I completely
13 agree.

14 THE COURT: I don't understand what the dispute is
15 between the two of you. What exhibit are you alluding to?

16 MS. KAPLAN: The communications with her advisor?

17 THE COURT: Yes.

18 MS. KAPLAN: That's Exhibit 7.

19 THE COURT: Without indicating on the record, can you
20 at least point me to the paragraph that you say is relevant.

21 MS. KAPLAN: Here is the perfect example. If you look
22 at page 3 of 5, in the middle.

23 THE COURT: These are e-mail exchanges.

24 MS. KAPLAN: Yes. Take a look in the middle. There
25 is an e-mail dated October 14, 2015 at 4:46, and there is a

1 statement to her from the advisor. I think that's the best
2 explanation.

3 THE COURT: Let me look at that.

4 MS. KAPLAN: Then some of the academic accommodations
5 I was referring to, your Honor, are on page 1 of that document.

6 THE COURT: Is there somewhere in this document where
7 it indicates what occurred to her?

8 MS. KAPLAN: No.

9 THE COURT: Show me, what does CPS stand for?

10 MS. KAPLAN: Counseling and psychological services.

11 THE COURT: Now, are these documents reflecting some
12 person-to-person, face-to-face conversation that occurred
13 between her and the advisor?

14 MS. KAPLAN: She says she reached out to her academic
15 advisor. It's not clear -- we don't know. She doesn't say she
16 called her or met with her, but we do have these e-mails from
17 that date.

18 THE COURT: You are not saying that this is the entire
19 communication between her and the advisor and you don't know
20 whether or not she walked into the advisor's office and had a
21 unrecorded conversation with the advisor.

22 MS. KAPLAN: There is a reference here to reaching out
23 on that date and there is a reference in the complaint that we
24 do have communications on that date between her and her
25 advisor, which is what we provided.

1 THE COURT: I understand.

2 MS. KAPLAN: Let's just go back to that. First of
3 all, if we just kind of eliminate the exhibits, your Honor, and
4 just look at the language in the complaint, the best that she
5 can come up with is strongly alluded. We just don't think it's
6 plausible that strongly alluded is enough in this context. If
7 you go to the document, you can see from the context that the
8 advisor has no basis or no information from which to assume or
9 have knowledge of the alleged assaults.

10 Then, on top of that, remember, your Honor, the
11 standard here is, is it clearly unreasonable under the
12 circumstances. Even despite all that, as you see in the
13 document, the advisor goes out of her way to provide plaintiff
14 with every possible accommodation she is asking for. This is
15 not a deliberately indifferent university. So given that fact,
16 there is no way that she can meet the standard either.

17 I want to turn, if I could, your Honor, to the second
18 time. Again, there are only two occasions that she says would
19 have triggered a duty to investigate prior to the time the
20 investigation actually occurred. The second one is on December
21 3, and we have talked about it a bit, and that's with the
22 executive vice-president of University Life. This is a meeting
23 that's explicitly dealt with in Columbia's policies and in the
24 OCR guidelines.

25 What the DOE guidelines say is that in order for

1 students to feel free to participate in preventative
2 educational programs and access resources for survivors, or
3 other forums at which students disclose experiences with sexual
4 violence are not considered notice to the school for the
5 purposes of triggering an individual investigation, unless the
6 survivor initiates a complaint. Columbia's policies, once
7 again, mirror this, and you can look at Exhibit 1 attached to
8 my affidavit, which are the policies at page 11.

9 The meeting with the executive vice-president of
10 student life, as we have discussed a bit already, your Honor,
11 is precisely that kind of forum. Both the DOE laws and regs
12 and Columbia's policies explicitly say that that does not
13 trigger an investigation unless the student asks for an
14 investigation.

15 What the plaintiff argues in response in her papers is
16 that that explicit guidance for that particular situation
17 should be overridden by general guidance. Just as a matter of
18 kind of legal reasoning, as we explained in our brief, your
19 Honor, that doesn't make any sense.

20 Moreover, when you go to plausibility standards, here
21 we actually have more because she herself admits, and we talked
22 about this at the beginning, that when she is reached out to in
23 January, after she fills out the survey, she tells the person
24 in January, after this meeting, weeks after, that she doesn't
25 want to officially report. So even if you didn't have the

1 specific guidance, but you do, about student advocacy forums,
2 which clearly applies here, it would be implausible, I believe,
3 your Honor, for the Court to conclude that she would have given
4 a different answer had she been contacted after that meeting
5 than she did several weeks later when she told them, don't ever
6 contact me again.

7 If I could, your Honor, let me turn to the case law.
8 A district court in Virginia last year, faced with the same
9 conundrum you're faced with, your Honor, noted there are very
10 few cases addressing this issue of a university's obligation,
11 if any, to proceed with an investigation into sexual assault
12 where the victim does not want to participate. And the cite
13 there is the *Butters* case, which is cited in our reply brief at
14 page 5, footnote 3.

15 Indeed, the courts have generally recognized that it's
16 hard to imagine how a university could take action reasonably
17 calculated to end the harassment here due to an investigation
18 without revealing the nature of the harassment, the identity of
19 the harassers, and even the plaintiff's own identity, which in
20 this case would have obviously been the plaintiff.

21 That is the problem that Columbia faced here, your
22 Honor, that I've been discussing. Up until the summer of '16,
23 Columbia really had no way of knowing what had happened, when
24 or where it had happened, or who may have done it without
25 plaintiff agreeing to cooperate.

1 I am going to point your Honor to two cases that deal
2 with this specifically. There are not many cases, but there
3 are two. One is the *Butters* case that I already referred your
4 Honor to, and there the plaintiff alleged that she was
5 assaulted by three male students and that the assault was
6 filmed on videotape. She told the investigators -- actually,
7 the facts were better in *Butters* than they are here. She told
8 the investigators that she did want there to be an
9 investigation, but she wanted confidentiality, and she wanted
10 the investigation to happen without her involvement.

11 The school officials concluded that the video alone
12 wasn't enough information and they didn't pursue the
13 investigation without her cooperation. The Court agreed that
14 that could not start a Title IX violation because, as the Court
15 concluded, given the plaintiff's grave concerns with
16 confidentiality, it was not clearly unreasonable for the
17 university to want her to consent to the process before
18 investigating or charging the assailants.

19 Indeed, as here, once she did file her complaint
20 later, the Court said that their lack of indifference, the
21 university's lack of indifference, is further highlighted by
22 the university's swift response once she did file her
23 complaint. The key language in that case, your Honor, appears
24 on pages 755 and 756. It's 208 F.Supp.3d 755 and 756.

25 There is another case, your Honor, which we did not

1 cite in our briefs and I apologize for that. It's called *Roe*
2 *v. St. Louis University*. It's an Eighth Circuit case from
3 2014. The cite there would be 746 F.3d 874. There the Eighth
4 Circuit affirmed a district court's finding that a university
5 did not act with deliberate indifference where, after a school
6 employee learned that the plaintiff had been assaulted, the
7 employee met with the plaintiff, referred her to a counselor,
8 informed her how to file complaints, but the plaintiff declined
9 to file a formal report of the assault and told university
10 employees that she did not want her parents told. Again, the
11 Eighth Circuit in that case relied expressly on the plaintiff's
12 desire and intention and expression of wanting there to be
13 confidentiality and not wanting to cooperate.

14 That's it, unless your Honor has questions. That's
15 really my argument on the first claim that she has, which is
16 the claim that the university should have somehow overridden
17 her wishes, at least based on those two communications I talked
18 about, and commenced an investigation anyway.

19 Let me turn to her other Title IX claim, which is for
20 failure to accommodate. Here her argument, as I understand it,
21 is that the university failed to provide her with the
22 accommodations she asked for. Here, your Honor, we are dealing
23 with a somewhat different problem. Here there is just zero
24 specific allegations in the complaint of accommodations that
25 she asked for and was not provided. Indeed, as your Honor

1 noted very early in my argument, when she talks about
2 accommodations in the complaint, she actually concedes that
3 they were provided to her.

4 Without that kind of specificity, the complaint has to
5 fail. And indeed, as the cases we have cited say, a university
6 is not obligated under Title IX to give a plaintiff or a
7 student exactly what she asks for. It's only required to give
8 reasonable accommodation. And here there is nothing in the
9 complaint that alleges any reasonable accommodation that she
10 asks for that was not provided.

11 And the Exhibit 7 that we looked at, your Honor, with
12 respect to academic accommodations really shows how Columbia
13 was going as far as it could and really working as hard as it
14 could to provide her with every single type of accommodation
15 that she was looking for. Given that, I just don't see any
16 claims stated in this complaint for failure to accommodate.

17 There is one more Title IX claim that she states, and
18 we apologize. I apologize for this, your Honor, because we
19 were a little confused. When we first saw her complaint she
20 has a complaint or a Title IX claim based on, quote, a sexually
21 hostile culture. We thought it was the same thing she was
22 alleging for the issues that we just talked about. Upon
23 getting her papers we realized that she was alleging something
24 different, that she was alleging preassault conduct by Columbia
25 that was so egregious, in her view. This is what the cases

1 say, that Columbia violated Title IX before anything ever
2 happened to her.

3 Your Honor, generally, this kind of preassault Title
4 IX violation is looked down upon by the courts, it's frowned
5 upon, and it's exceedingly rare. It's happened in a couple of
6 cases. We cite them in our brief. But in those cases the
7 plaintiff has to allege a general policy of indifference to
8 sexual misconduct on campus. That comes from the *Gebser* case,
9 which we cite, and the *C.T. v. Liberal School District* case,
10 which we also cite in our briefs.

11 The factual situations in the cases that I found this
12 are quite extreme, completely unlike anything that she alleges
13 here or possibly could be alleged about Columbia. In *Simpson*,
14 which is considered kind of the paradigmatic example of this,
15 there is an official school program that was for football
16 recruiting in which female students known as ambassadors were
17 paired with male football recruits and asked to show them a
18 good time. In that kind of pretty egregious scenario, the
19 courts have found that you could have this preassault Title IX
20 claim.

21 Baylor University, which I'm sure your Honor read
22 about, Starr, Special Counsel Starr was actually the president
23 and had to resign as a result of what happened there. There
24 were allegations of just widespread ignorance and indifference
25 in repeated occasions of trying to wipe complaints of sexual

1 misconduct under the rug. Again, there is not a single
2 allegation that there is anything like that in this complaint
3 about Columbia, nor could there be.

4 Even in *Tubbs*, which plaintiff cites which comes from
5 closer to this area, the allegation was that there had been a
6 finding by the DOE against SUNY in that case of repeated
7 violations -- there are no allegations of any finding against
8 Columbia by OCR and there has not been -- that SUNY agreed to
9 remedy the violations that DOE found and that SUNY subsequently
10 failed to do so. Again, you are looking at extreme, for lack
11 of a better term, *mens rea* on the part of the university that
12 the plaintiff does not allege and could not allege with respect
13 to Columbia. I think that deals with respect to the preassault
14 sexually hostile claim.

15 All I have left, your Honor, and I'm happy to address
16 it, if your Honor wishes -- I am not sure whether we have a
17 dispute on this. I can leave it to plaintiffs -- all I have
18 left are the state law claims. Our view, your Honor, as you
19 might expect, if you dismiss the federal claims, then you have
20 discretion and you should dismiss the state law claims here.
21 As well, if plaintiff disagrees with that, I'm happy to address
22 them on the merits.

23 THE COURT: Let me hear from the plaintiffs.

24 Mr. Zalkin.

25 MR. ZALKIN: Good morning, your Honor or I guess it's

1 afternoon.

2 THE COURT: Good afternoon.

3 MR. ZALKIN: Your Honor, I'd like to start with the
4 extrinsic evidence offered in this case by defendant and
5 offered with defendant's motion. It's our position that the
6 exhibits sought to be introduced by defendant are wholly
7 inappropriate, that they do not meet the requirements for the
8 incorporation by reference doctrine and, therefore, it would be
9 inappropriate for this Court to consider any of their contents
10 when ruling on this motion.

11 Your Honor, this exact approach that defendant has
12 taken here, namely, submitting extrinsic evidence on a motion
13 to dismiss, and citing the incorporation by reference doctrine,
14 was attempted and summarily rejected by the Court in *Tubbs v.*
15 *Stony Brook University*. In that case the defendant university
16 introduced or sought to introduce and rely on 21 exhibits,
17 similar in nature to the exhibits defendant has offered here.
18 And what the Court said in that case is, consideration of such
19 evidence is wholly improper on a motion to dismiss where the
20 inquiry is limited to whether plaintiff's allegations, accepted
21 as true, state a claim as a matter of law.

22 THE COURT: Let's start with that because I'm not
23 quite sure you objected shotgun approach to every one of their
24 documents. I am not sure I know which ones you are really
25 fighting about. The facts, as you're alleging them, are not

1 inconsistent with the doctrines, nor are you alleging that
2 those documents are somehow doctored or don't reflect the facts
3 as you understand them to be.

4 It seems to me the crux of your argument is whether or
5 not -- I'm trying to get a handle on the nature of your
6 allegation, what it is that you say that she informed them of
7 and what it is that she asked them to do that they failed to do
8 and why did they have the responsibility to do an investigation
9 when she said that she did not want an investigation. Those
10 are the central issues here, as you've alleged.

11 MR. ZALKIN: If I understand your Honor's questions,
12 they are kind of two separate questions there. One is, why
13 were these documents inappropriate.

14 THE COURT: I don't know which document you're
15 fighting over. I don't know what that document says that you
16 somehow are saying that, oh, that creates some disputed issue
17 of fact that you think is inappropriate at this stage. The
18 documents pretty much reflect what you say, unless you say that
19 there is something that the documents are adding to your
20 complaint or detracting from your complaint that you think is
21 unfair. I don't need to concentrate on the documents. I need
22 to concentrate on what you say the facts were and what you say
23 she informed them of and what it is that she asked them to do
24 that they failed to do.

25 MR. ZALKIN: We do maintain that the documents,

1 several of the documents, seek to either disprove her
2 allegations or expand on her allegations, both of which are
3 inappropriate at the motion to dismiss stage.

4 THE COURT: Fine. Then I'll accept that premise. I
5 still want to know the answers to my questions with regard to
6 your complaint. I can tell you right away that it is an
7 insufficient allegation, factual allegation to simply say,
8 without explicitly saying that she was raped, plaintiff
9 strongly alluded to her academic advisor that plaintiff had
10 been raped. That's not a factual statement. I don't even know
11 what that means. That's like saying, I went into McDonald's
12 and without saying I wanted french fries, I strongly alluded to
13 the fact that I wanted french fries. That's not a fact.

14 You've got to give me something that you say happened.
15 If you don't want me to rely on their extrinsic evidence, then
16 you have to put in some facts that tell me that I should
17 conclude that the nature of this conversation was a
18 conversation about rape and a conversation in which the only
19 reasonable response would have been that they would have
20 initiated an investigation that this person was raped, even
21 though this person never said that they were raped. What does
22 that mean?

23 MR. ZALKIN: I think at the pleading stage, your
24 Honor, you are required to accept all reasonable inferences.

25 THE COURT: Of facts.

1 MR. ZALKIN: Right. The inference to be drawn from
2 that allegation --

3 THE COURT: How can you say someone didn't explicitly
4 say they were raped but they strongly alluded to the fact that
5 they been raped and that's supposed to be a fact that I am
6 supposed to rely on? How is that a fact? That's not a fact.
7 That's a conclusion. What are the facts that make that a
8 reasonable conclusion? What is it that you are claiming that
9 she said to the advisor that one would reasonably interpret as
10 a conversation about rape?

11 MR. ZALKIN: Your Honor, that's probably best left for
12 discovery.

13 THE COURT: No, it's not. You've got to give me a
14 fact. That's not a fact. You say that you are relying on the
15 fact that they had a conversation that would have put them on
16 notice that it was about rape, even though no one said it was
17 about rape. How am I supposed to say that that's a sufficient
18 factual allegation? That's not a factual allegation. What is
19 it that you say occurred in that conversation that would make
20 the person that you could allege factually that would
21 reasonably make that person on notice that this conversation
22 was about rape?

23 MR. ZALKIN: We allege that she alluded to being
24 raped.

25 THE COURT: What does that mean, she alluded to? How

1 does one allude to being raped?

2 MR. ZALKIN: There is no other allegation in the
3 complaint.

4 THE COURT: I know. That's not a factual allegation.
5 I can't say you alluded to being run over by a truck. That's
6 not a factual allegation. You have to tell me what was said.
7 What was said that you say is alluding to a rape? What
8 factually are you trying to say?

9 MR. ZALKIN: I don't have the exact words that
10 happened in that conversation.

11 THE COURT: Then I can't conclude that she alluded to
12 being raped because you say she didn't say she was raped. In
13 what way did she allude to it?

14 MR. ZALKIN: She had a conversation with her academic
15 advisor in which she alluded to it. I don't know the words,
16 the specific words that she used.

17 THE COURT: What makes you say she alluded to it?

18 MR. ZALKIN: I do know that her academic advisor was
19 concerned enough to take it up the chain and say, something
20 happened, something serious happened to this girl --

21 THE COURT: What would make that something serious
22 that happened, being raped rather than some sort of emotional
23 or mental breakdown?

24 MR. ZALKIN: Right. I don't have the exact words that
25 were said.

1 THE COURT: Give me in substance what words were said
2 that would make me conclude that they had a conversation about
3 rape. It is wholly inconsistent to say, without explicitly
4 saying she was raped, she strongly alluded that she had been
5 raped. It means nothing. I don't know what that means. How
6 does one strongly allude to being raped if one doesn't say that
7 they were raped?

8 MR. ZALKIN: I think in conversation we can allude to
9 events without specifically --

10 THE COURT: What events are you saying she alluded to?

11 MR. ZALKIN: To being raped in her dorm room.

12 THE COURT: How does she allude to that event?

13 MR. ZALKIN: I get your --

14 THE COURT: What the nature of that conversation is
15 and the way you've alleged it in the complaint and the way you
16 are trying to explain it to me now makes me think that she
17 never said anything about rape. You have given me no fact that
18 you and I would conclude that she alluded to a rape. What
19 makes you think that she alluded to a rape?

20 MR. ZALKIN: Because my client has explained to me
21 that in this conversation she alluded to being raped, that her
22 academic advisor understood that she was sexually assaulted,
23 that she reported it up the chain, that the wellness advisor --

24 THE COURT: But she didn't report it up the chain.

25 MR. ZALKIN: The academic advisor reported it to her

1 immediate supervisor.

2 THE COURT: Did the academic advisor report to her
3 immediate supervisor that the plaintiff had been raped?

4 MR. ZALKIN: I don't know the nature of what her
5 academic --

6 THE COURT: But that's what you are claiming.

7 MR. ZALKIN: That's why we need to have discovery.

8 THE COURT: No. That's why you need to give me the
9 facts because you know what your client said to the academic
10 advisor and you know whether or not your client -- you know
11 your client didn't say she was raped, right?

12 MR. ZALKIN: Right.

13 THE COURT: You want me to infer that somehow there
14 was a conversation, that if you and I were in that conversation
15 the only reasonable conclusion would be that we were in a
16 conversation about rape. I don't know how to conclude that
17 without a fact. You have to tell me what she said that would
18 make -- I have no idea how one cannot say that they were raped
19 but could allude to the fact that they were raped. I have no
20 idea what that means.

21 MR. ZALKIN: I understand, your Honor, and I don't
22 have an answer to that question presently today. I can confer
23 with my client and amend the complaint, if that is the crux of
24 your Honor's decision. I would ask for leave to amend to allow
25 me to provide that context to your Honor.

1 But notwithstanding that conversation, your Honor, she
2 did explicitly report that she was raped to the senior
3 vice-president for student life.

4 THE COURT: I'm sorry. Who?

5 MR. ZALKIN: Executive vice-president for student
6 life.

7 THE COURT: When was that?

8 MR. ZALKIN: That was on December 3, 2015.

9 THE COURT: The executive vice-president?

10 MR. ZALKIN: Yes.

11 THE COURT: December 3.

12 MR. ZALKIN: And at that point, because that
13 individual was not a confidential employee, she was required by
14 Columbia's own policy to report plaintiff's rape to the
15 gender-based misconduct office and/or the Title IX office,
16 which she didn't do.

17 THE COURT: Why would she do that? Why would she have
18 an obligation to do that if your client said she did not want
19 to report it?

20 MR. ZALKIN: My client did not say that at that point.

21 THE COURT: Well, it doesn't matter at what point.
22 Let's start at the point that she did say that, if she said
23 that on January 19.

24 MR. ZALKIN: Correct.

25 THE COURT: Is there any reason that they would have

1 had a responsibility between January 19 and August 5 to open an
2 investigation if she specifically told them not to open an
3 investigation and she specifically said, don't contact me ever
4 again about this?

5 MR. ZALKIN: Yes. First, your Honor, the conversation
6 I was referencing occurred prior to.

7 THE COURT: I understand that. I just want to start
8 with that because I want to see how far your argument goes. If
9 she says on January 19, and then we can go back to December, if
10 she says on January 19 that, I don't want to officially report
11 this, I don't want you to investigate this, and in fact don't
12 ever contact me again about this, what is your argument that
13 from January 19 to August 5 that they had an obligation to do
14 exactly what she told them not to do?

15 MR. ZALKIN: My argument is twofold, your Honor.
16 First, the reason that she said those things to Ms. Blount at
17 that time was because of her frustration with the process that
18 she had received prior to that point in time.

19 THE COURT: Why would that matter?

20 MR. ZALKIN: Because at that point she had called the
21 sexual violence hotline and she had said, I was raped, what are
22 my options, what are my resources under Title IX, and the
23 sexual hotline person did not know. They kept trying to
24 convince her to report it to the police.

25 Then she asked the staff advocate, what are my options

1 under Title IX? The Title IX staff advocate did not have an
2 answer for her. She asked for housing accommodations.

3 THE COURT: What housing accommodations? You mean to
4 put the lock --

5 MR. ZALKIN: She asked to move. She didn't feel safe
6 in her dorm. She was told: OK. You have 24 hours from some
7 arbitrary date that we are going to give you to move. You
8 don't get any help with moving your physical belongings. You
9 are going to have to pay \$500 and we are going to have to tell
10 your parents why you are moving.

11 THE COURT: The awkward part of this is that despite
12 all of that, on August 5, she said she did want the university
13 to investigate. How does that change the analysis? That was a
14 decision that she made. She had the same information that
15 you're playing out for me now.

16 MR. ZALKIN: Yes.

17 THE COURT: At one point in time that information made
18 her conclude that she did not want it investigated and she did
19 not want to be contacted again. At a later point that same
20 information made her conclude that she did want to go forward
21 with an investigation. It's sort of irrelevant why she made
22 whichever decision she made.

23 The question is, if she said to them, for whatever
24 reason, she distrusts them, they didn't treat her well, somehow
25 they didn't respond appropriately, that doesn't go to whether

1 or not once she said, I don't like you, I don't want to put
2 this in your hands, I don't think you are doing what you should
3 be doing, so leave me alone and forget about it, why does that
4 put a burden on them to do just the opposite simply because of
5 her motivation of why she doesn't want them to do that,
6 particularly in light of the fact that months later she changes
7 her mind and does want them to do that? What difference does
8 it make what her motivation is? If she says, I don't want you
9 to do it, if she says that because I want my confidentiality
10 protected or she says that because I don't think you people
11 will do an adequate job and I don't want you to bother me at
12 all about this because you just don't know what you are doing,
13 regardless of what her reasons were, why would that put the
14 obligation on them to do something when she told them not to do
15 something?

16 MR. ZALKIN: Your Honor, the Supreme Court actually
17 imposes that obligation on educational institutions.

18 THE COURT: To do what? To investigate --

19 MR. ZALKIN: To respond in a manner that's not clearly
20 unreasonable to actual knowledge of sexual misconduct.

21 THE COURT: What is it that you think that they should
22 have done if she said that she didn't want to make an
23 investigation, she didn't want to initiate an investigation,
24 and she was not going to cooperate with that investigation?
25 And, in fact, she made it real clear that she didn't even want

1 them to ever contact her again about this incident.

2 I understand all your other arguments about what could
3 or couldn't have been done before January 19. I'm just trying
4 to figure out how far you are trying to stretch that argument
5 and whether you are trying to tell me to find some legal
6 obligation on the part of Columbia to open an investigation
7 after she said, I don't want you to open an investigation, I
8 don't want you to do anything about this, I don't even want you
9 to ever contact me again about this. What is the legal
10 obligation that they have after she makes those statements to
11 do anything to investigate until she comes back to them in
12 August and says, you know what, I changed my mind, I want you
13 to investigate? Why is anything that they did between January
14 19 and August 5 inappropriate, given her position with regard
15 to what she wanted them to do?

16 MR. ZALKIN: Your Honor, the obligation is to respond
17 in a way that is not clearly unreasonable. That may not
18 necessarily mean that they need to formally investigate, but
19 they are under an obligation to respond.

20 THE COURT: What are they under an obligation to do if
21 she said she wasn't going to cooperate with any investigation
22 and she wasn't going to give them any further information, and
23 they didn't even have a suspect at that point in time, and she
24 was not willing to cooperate to provide them any further
25 information and didn't want them to contact anybody

1 specifically to ask them about this incident?

2 You say, they can't do something that's clearly
3 unreasonable. What do you say would have been the reasonable
4 response to her saying, don't open an investigation, leave me
5 alone, don't contact me again, don't contact anybody else who
6 might be witnesses because I don't want to get them involved.
7 I want you to do nothing. Wouldn't you agree that what she
8 said to them January 19 is that I want you to do nothing?

9 MR. ZALKIN: Yes.

10 THE COURT: Once she says to them, I want you to do
11 nothing, and I will not cooperate, and I don't even want you to
12 come to me and discuss this with me again, why would they say,
13 yes, we will respect that, an unreasonable response?

14 MR. ZALKIN: Because I think they have an obligation
15 to not only plaintiff at that point, but to the greater student
16 community.

17 THE COURT: The greater student body isn't suing. She
18 is suing personally for personal injury to herself. This isn't
19 a class action. This is her saying that she was injured by the
20 fact that they didn't do the investigations that she told them
21 not to do. That part, you can understand, is an awkward part
22 of your case between January and August because what I see, and
23 we can go back and maybe you had a stronger argument prior to
24 January.

25 But the scenario as you have relayed it is, in January

1 she said they took the initiative to try to discuss this with
2 her, to try to initiate an investigation. She said, don't do
3 it. She said, I don't want to talk to you about it anymore. I
4 don't want you to talk to others about it. For whatever
5 reason, good or bad or indifferent, I don't want you to do
6 that. They say, fine, we will respect that, and we won't do
7 anything because the reality is, the nature of your
8 circumstance, the allegations are such there is not much we can
9 do unless we can get some more information from you about the
10 way, where, who, how, what happened. You don't want to give us
11 that information. You don't want us to talk to other people
12 who might have that information, and you don't want to be
13 contacted about this again. We will respect that.

14 Then in August she changes her mind and she says, you
15 know what, I changed my mind. I want you to investigate. At
16 that point clearly the proper response would have been, OK, we
17 will open an investigation. That's what happened. She said, I
18 changed my mind 10 months later or whatever months later. I
19 want you to investigate. They said they would. She says that
20 just before school starts, as I understand. As soon as school
21 starts, within a month, they open an investigation. They
22 investigate. They take her statement. They try to find
23 videotapes which aren't existing anymore about intruders from a
24 year earlier, and they do an investigation.

25 I don't understand why their response to the July 19

1 request not to investigate and their response to the August 5
2 request to investigate, I am not sure I understand, by the
3 nature of your allegation, why their response to those two
4 incidents was inappropriate. We can go back to before that and
5 after that, but tell me what was inappropriate about what they
6 did in January and how they responded to her request not to
7 investigate and what they did in August, how they responded to
8 her request to investigate in August. What was inappropriate
9 about their response?

10 MR. ZALKIN: So the reason why I'm arguing that they
11 had an obligation to do something in January is because you
12 can't divorce that conversation from its context, everything
13 that happened prior to. To accept that premise would be to
14 incentivize educational institutions to drag their feet, to not
15 accommodate students, to discourage students from reporting.
16 And then when a student finally throws their hands up and says,
17 you know what, forget about it, it absolves them of any
18 responsibility from doing anything. That's not consistent with
19 the Title IX.

20 THE COURT: But the problem I have with your
21 allegation is that in this timeline I don't see any place where
22 she made a formal request or report of the incident, one that
23 would clearly be a report indicating that she wanted them to
24 investigate. Would you agree that between October 5 and
25 December 3 that she did not make a report on which she expected

1 them to do an investigation?

2 MR. ZALKIN: She did not make a formal report.

3 THE COURT: I didn't say it that way. I said it even
4 broader than that. Don't you agree that she did not make a
5 report that she expected the university to initiate an
6 investigation as a result of that report any time between
7 October 5 and December 3?

8 MR. ZALKIN: I don't think her subjective expectations
9 are what the law --

10 THE COURT: I didn't ask you that. I just asked you a
11 fact. Is that a fact?

12 MR. ZALKIN: That is a fact. She did not say to
13 anybody --

14 THE COURT: You want to characterize the meeting with
15 the executive vice-president as her request -- that her
16 reporting a rape and asking them to investigate.

17 MR. ZALKIN: I'm characterizing that as the
18 university's actual knowledge that she was raped. And what the
19 Supreme Court in *Davis* tells us is that a university or an
20 educational institution, upon receiving actual knowledge, not
21 necessarily a formal report, not any subjective report or
22 desire to investigate or anything like that, the Supreme Court
23 says, upon receiving actual knowledge of sexual misconduct an
24 educational institution has a duty to respond in a manner that
25 is not clearly unreasonable in light of the known

1 circumstances.

2 THE COURT: If she tells them on December 3 that she
3 was assaulted on October 5 and then she is again assaulted on
4 December 14, you are not arguing that they were put on notice
5 of the December 14 assault. That's not your argument.

6 MR. ZALKIN: No, that's not our argument.

7 THE COURT: Your argument is they had an obligation to
8 respond only to the October 5 because obviously as of December
9 3 there was no way to report a December 14 assault.

10 MR. ZALKIN: Sure.

11 THE COURT: After December 14 she does not report that
12 assault, the second assault, and then by January 19 they reach
13 out to her.

14 MR. ZALKIN: Yes.

15 THE COURT: It's clear, by January 19 they are on
16 notice of a sexual assault.

17 MR. ZALKIN: Yes.

18 THE COURT: January 19 they reach out to her. At that
19 point she has been assaulted twice.

20 MR. ZALKIN: Yes.

21 THE COURT: In October and in December. On January
22 19, approximately 35 days after the second assault, she says to
23 them that she does not want to officially report her assault,
24 that she doesn't want an investigation open, and that they are
25 not to contact her ever again. What is their obligation at

1 that point?

2 MR. ZALKIN: Their obligation would have started --

3 THE COURT: At that point.

4 MR. ZALKIN: At that point, presumably, they would
5 have responded in some way to her initial report.

6 THE COURT: Not presumably. We know they didn't
7 respond.

8 MR. ZALKIN: Should have responded.

9 THE COURT: Fine. They should have responded. But as
10 of January 19, approximately a month after the second assault
11 that she did not formally report, she told them that she did
12 not want an investigation done of either assault and they
13 should never contact her again.

14 MR. ZALKIN: Yes.

15 THE COURT: I am trying to figure out from your
16 complaint what it is you say is their obligation at that time.

17 MR. ZALKIN: They have an obligation to take
18 reasonable steps to mitigate the sexually hostile environment
19 for plaintiff on campus.

20 THE COURT: What does that mean?

21 MR. ZALKIN: For one, they could have moved her.

22 THE COURT: But she didn't ask to be moved.

23 MR. ZALKIN: She had already asked to be moved prior
24 to that.

25 THE COURT: That's not my understanding. When did she

1 ask to be moved?

2 MR. ZALKIN: She asked to be moved --

3 THE COURT: My recollection is, she asked to be moved
4 after they did the investigation in September and October of
5 2016.

6 MR. ZALKIN: She asked again to be moved at that
7 point. She asked to be moved originally.

8 THE COURT: When?

9 MR. ZALKIN: In her conversation with the sexual
10 violence response staff advocate.

11 THE COURT: How is that supposed to have gotten to the
12 university? That's a confidential conversation. That's not a
13 conversation with the university.

14 MR. ZALKIN: She was also told by the housing --

15 THE COURT: When did she tell the university?

16 That I want to be moved because I was raped? Is that
17 what you are saying? Because I don't see that. She doesn't
18 say that, does she?

19 MR. ZALKIN: My understanding, your Honor, is she
20 spoke to the staff advocate, reported that she was raped.

21 THE COURT: You say the conversation with the staff
22 advocate triggers their responsibility.

23 MR. ZALKIN: What I'm saying is, she was told by the
24 staff advocate that if she wanted to be moved, these were the
25 owner's conditions that were going to be placed on her.

1 THE COURT: Let me ask you this. Is the staff
2 advocate an employee of the university?

3 MR. ZALKIN: I believe so.

4 THE COURT: Are you arguing that the conversations
5 with the sexual violence response hotline is a conversation
6 that should be imputed to the university?

7 MR. ZALKIN: No. I'm arguing that this Court can
8 consider those conversations in assessing the reasonableness of
9 defendant's conduct.

10 THE COURT: Your first argument, when we started this
11 part of the conversation, was that she asked for a reasonable
12 accommodation which they denied and then I asked you, where did
13 she ask for a reasonable accommodation of the university? And
14 you say, well, she said something to the staff advocate about
15 it. Well, that's not a request to the university, is it?

16 MR. ZALKIN: I think it was a request for information
17 about --

18 THE COURT: Right. If that person gave her wrong
19 information, that's not imputed to the university.

20 MR. ZALKIN: I think if that person gave her the wrong
21 information, it would actually be evidence of the
22 reasonableness of defendant's conduct.

23 THE COURT: But I'm still not following that argument.
24 If she wants a reasonable accommodation, is the appropriate
25 person to ask for an accommodation the staff advocate at the

1 sexual violence response hotline?

2 MR. ZALKIN: I don't know if there is necessarily an
3 appropriate person.

4 THE COURT: It's not the appropriate person. That
5 person doesn't have that responsibility and that communication
6 with that person is not to be shared with the university.
7 Isn't that the premise of how the hotline is set up?

8 MR. ZALKIN: That's true. My understanding is the
9 advocate is somebody that you can speak to in order to
10 understand your rights and resources under Title IX, one of
11 which is, as the gender-based misconduct policy states, that a
12 student will get reasonable accommodations. If you are asking
13 the staff advocate, what are my rights and resources under
14 Title IX, I think that staff advocate would not know the
15 policies --

16 THE COURT: But you are not saying that she asked the
17 staff advocate, Paul, to give her another room and Paul refused
18 to do so. That's not what you are arguing, right?

19 MR. ZALKIN: No.

20 THE COURT: And you are not arguing that she ever
21 asked the university to give her another residence and the
22 university refused to do so, are you?

23 MR. ZALKIN: The university never refused to give her
24 another room.

25 THE COURT: You said, well, they didn't accommodate

1 her. And I said, well, what didn't they accommodate? You
2 said, giving her another room. I said, when she asked for
3 either a lock on the door or another off-campus location, they
4 offered her the choice and she took one or the other, so they
5 did accommodate her. But you said they didn't accommodate her
6 back in October of 2015 when she wanted an accommodation. Then
7 I asked you, when in October did she ask the university for an
8 accommodation and you say to me, well, she just asked some
9 questions of the staff advocate but never really asked the
10 university if she could have another room. As a matter of
11 fact, at that point she never even told the university that she
12 had an incident, right?

13 MR. ZALKIN: Correct.

14 THE COURT: How would they be informed of a reasonable
15 accommodation with regard to a rape if she never informed the
16 university at that point in time that she had been raped.

17 MR. ZALKIN: That's fair, your Honor, and admittedly I
18 don't know the exact person and circumstances. I know she
19 discussed it with the staff advocate. I don't know exactly if
20 she formally requested that accommodation.

21 THE COURT: So the crux of your complaint is that as
22 of December 3, when she was in the meeting with the
23 university's executive vice-president, and she said in that
24 open forum that she had been raped, that triggered their
25 responsibility to do an investigation, take some affirmative

1 action, and reasonably accommodate her?

2 MR. ZALKIN: Yes.

3 THE COURT: Don't they have to reasonably accommodate
4 some request?

5 MR. ZALKIN: Well --

6 THE COURT: She didn't make a request.

7 MR. ZALKIN: That's correct, your Honor. If she had
8 made a formal request for accommodations --

9 THE COURT: But she did not.

10 MR. ZALKIN: Right. But it does trigger their
11 obligation to respond in a way that's clearly not unreasonable.

12 THE COURT: Isn't part of the university's response
13 that the case manager, Ms. Blount, called on the 19th and said,
14 I understand that you were raped, we want to investigate this,
15 and she said, no, don't do it? Wouldn't that be a reasonable
16 response? To call and say to her that we understand that you
17 have indicated to us, we are acknowledging that as of January
18 we think that you have been raped, it's our obligation to do
19 something, let us do something, and she says no, don't do
20 anything?

21 MR. ZALKIN: Yeah. I think a reasonable juror could
22 look at that and say, it was reasonable to not investigate.
23 They could informally question people on her floor.

24 THE COURT: Didn't she say she didn't want them to
25 talk to anybody?

1 MR. ZALKIN: The allegations are still that she was
2 violently raped twice in her dorm room. I think they had an
3 obligation at least to try to figure out what, if anything,
4 happened.

5 THE COURT: Not on the scenario you just stated
6 because they had no information at that point that she had been
7 raped.

8 MR. ZALKIN: They had information that she was at
9 least raped once.

10 THE COURT: You said there was information that she
11 had been raped twice. She may have discussed the December 3
12 incident in a public forum, but she never discussed the
13 December 14 incident with the university.

14 MR. ZALKIN: Correct. I misspoke if I said twice. I
15 meant to say they had at least knowledge, actual knowledge of
16 one of her assaults, and they could have at least done
17 something --

18 THE COURT: They did do something. They did something
19 on January 19. They said, we understand that you were raped
20 and we want to do an investigation.

21 MR. ZALKIN: Correct.

22 THE COURT: That's what they did do. That would be
23 the appropriate thing to do, correct?

24 MR. ZALKIN: That could be an appropriate thing to do.

25 THE COURT: That was an appropriate thing to do.

1 MR. ZALKIN: Because there is also the larger question
2 of, there is an alleged rapist on the loose at Columbia
3 University, in your dorm room perhaps, and they did nothing to
4 determine what, if anything --

5 THE COURT: I am not sure that she has standing to sue
6 for that because that didn't cause her any injury.

7 MR. ZALKIN: It did, your Honor.

8 THE COURT: What injury did it cause her once she told
9 them she did want not want them to investigate, so they stopped
10 investigating. And once she told them she did want them to
11 investigate, then they did investigate. What is the injury
12 that was caused by them -- you say, well, they had an
13 obligation to others. I'm concentrating on the obligation they
14 had to her because she is the one suing. She is not suing on
15 behalf of others. She is here suing on behalf of her behalf
16 saying that she suffered injury because, one, they didn't
17 properly investigate the rapes and, two, because they didn't
18 accommodate her. I am not sure in what way you are arguing
19 that they didn't accommodate her and a reasonable accommodation
20 that she requested from them, and I am not sure what you are
21 saying that they should have done other than what they did in
22 January. If they did on December 4 what they did on January
23 19, wouldn't that have been an appropriate response?

24 MR. ZALKIN: That would potentially would have been
25 part of the appropriate response.

1 THE COURT: That would have been the appropriate
2 response because she said in light of that response she didn't
3 want them to do anything else. Is it your argument that even
4 though she said she didn't want them to do anything else for
5 her that they should have done something else for her?

6 MR. ZALKIN: Yes, your Honor.

7 THE COURT: What else should they have done for her
8 when she said she didn't want them to do anything else for her?

9 MR. ZALKIN: I think what she said is, I don't want to
10 talk to you about this.

11 THE COURT: You don't need a rocket scientist to
12 figure out what that means. It means leave me alone. I don't
13 want you to do an investigation and I don't want to talk about
14 this anymore. What should have they done? They should have
15 forced her to cooperate?

16 MR. ZALKIN: They could have perhaps, like I said,
17 interviewed other people on the floor, her suite mates, to see
18 if anybody saw anything. They could have reviewed the security
19 tapes at the time.

20 THE COURT: Suppose at that point they spoke to
21 people, they found out who it was and they took action against
22 that person. I can't say it that way because I am not sure
23 what they could have done with that information if she said she
24 didn't want that information ever disclosed.

25 MR. ZALKIN: That presupposes that if they had

1 actually found the individual that did this that she would have
2 been consistent in saying --

3 THE COURT: You have to presuppose that because she
4 cut that off. She prevented that from happening.

5 MR. ZALKIN: She prevented that under the belief that
6 Columbia had not done anything in response --

7 THE COURT: In response to what?

8 MR. ZALKIN: Initially, when she called the sexual
9 violence hotline, that she was giving no information.

10 THE COURT: What does that have to do with whether
11 Columbia is going to do an investigation, calling the hotline?

12 MR. ZALKIN: Your question was, if they had caught
13 this individual and they wanted to do something about it.

14 THE COURT: And she said, don't talk to me ever again.

15 MR. ZALKIN: I'm saying, I don't think it's a fair
16 assumption to make that she would say, don't do it again, I
17 don't want anything to do with this if in fact they had
18 investigated and caught the individual.

19 THE COURT: On October 3, when she spoke to the sexual
20 violence response hotline and reported that she had been
21 assaulted, tell me what they should have done.

22 MR. ZALKIN: When she had asked what her rights and
23 resources under Title IX were --

24 THE COURT: I'm talking about the first conversation
25 on October 3. What is it that they did that was improper?

1 MR. ZALKIN: They were unaware of Title IX, the rights
2 and resources available to sexual assault victims. They
3 weren't able to give her that information.

4 THE COURT: Give her what information? I don't know
5 what you're talking about because you have not alleged
6 anything. Is there some factual allegation in this complaint
7 regarding that? I am not sure what you're talking about. She
8 asked them what?

9 MR. ZALKIN: She asked for, what are her rights and
10 options and resources available to her as a sexual assault
11 victim.

12 THE COURT: When she was on the phone, on the hotline.

13 MR. ZALKIN: Yes.

14 THE COURT: And the hotline person told her --

15 MR. ZALKIN: Was unable to answer that question.

16 THE COURT: So the hotline person said, I will have
17 somebody call you the next day?

18 MR. ZALKIN: Right.

19 THE COURT: You don't think that that was an
20 appropriate response if the person really doesn't know who is
21 on the hotline that they would say, well, I will have somebody
22 call you back tomorrow?

23 MR. ZALKIN: What we allege in our complaint, your
24 Honor, is that that sexual violence hotline operator was
25 untrained. What we are saying is that what's reasonable is if

1 you are going to have a sexual violence hotline where you know
2 victims of sexual violence are going to call and report these
3 things and undoubtedly are going to ask what are my options, it
4 would be reasonable to train the individuals to take those
5 calls to answer those questions.

6 THE COURT: I don't understand. The next day, the
7 very next day, on October 14, they in fact had, I assume, a
8 more knowledgeable person call her back.

9 MR. ZALKIN: That's an incorrect assumption.

10 THE COURT: I assume they had a less knowledgeable
11 person call her back. I'll give it whatever inference you
12 want, but the person called her back.

13 MR. ZALKIN: And she asked him, what are my rights and
14 resources under Title IX, and he was unable to answer that
15 question.

16 THE COURT: The problem is, you have the October 5
17 assault. You have an October 14 conversation. Even in that
18 conversation she says that she doesn't want to report the
19 assault.

20 MR. ZALKIN: To the police.

21 THE COURT: I don't know. You say that. She said she
22 wanted to report it to the university but not the police.

23 MR. ZALKIN: I can represent to you now that if
24 allowed to amend the complaint on that issue I can tell you
25 that she did not want to report this to the police.

1 THE COURT: Did she want to report it to the
2 university?

3 MR. ZALKIN: At that point she wasn't sure. But she
4 wanted to know --

5 THE COURT: Did she say to the person, I don't want to
6 report this alleged assault?

7 MR. ZALKIN: She said that in the context of the
8 police.

9 THE COURT: Did she say she did want to report it to
10 the university or she said nothing about the university, or she
11 said she didn't want to report it to the university?

12 MR. ZALKIN: She didn't say anything about reporting
13 it to the university. What she asked for were, what are my
14 rights, what are my options, what are my resources under Title
15 IX at this point. That would have included what her option --

16 THE COURT: I assume that they told her in that
17 conversation that she could report it either to the police or
18 she could report it to the university, right? Are you saying
19 they didn't have that basic information?

20 MR. ZALKIN: As alleged, when asked, did she report it
21 to the school -- when asked, what are my options under Title
22 IX, the operator was unable to answer that question.

23 THE COURT: You are not arguing that she didn't know
24 that her options were to either report this to the police or
25 report it to the university?

1 MR. ZALKIN: Right.

2 THE COURT: You are not arguing that. That's not
3 really a reasonable argument to make.

4 MR. ZALKIN: No, your Honor.

5 THE COURT: She spoke to the hotline on October 3,
6 made some inquiries of the hotline. They said we would have
7 somebody call you back October 4. They called her back.
8 Regardless of what questions they could or couldn't answer, she
9 knew that there were at least two options. She could make a
10 formal criminal complaint, an actual criminal investigation by
11 the police, and/or she could report it to the university on the
12 university's procedure that she was well aware of and the
13 university would have had an obligation to investigate, right?
14 She knew that.

15 MR. ZALKIN: She knew she had the option to report it
16 to the school, yes.

17 THE COURT: She did not, right?

18 MR. ZALKIN: At that point, no.

19 THE COURT: And you say that her statement on December
20 3 at this meeting was her attempt to report this to the
21 university for the university to investigate it?

22 MR. ZALKIN: No. I'm saying what that was was actual
23 knowledge.

24 THE COURT: You are just saying that put them on
25 knowledge, but that wasn't her request.

1 MR. ZALKIN: It wasn't a formal or otherwise a request
2 to investigate. It put them on knowledge that the Supreme
3 Court tells us that's the trigger that obligates a response.

4 THE COURT: Is there any indication prior to August 5
5 of 2016 that she wanted to report this to the university,
6 wanted the university to investigate it, and she would
7 cooperate with such an investigation? Is there any indication
8 that she was of that mind at any time prior to August 5?

9 MR. ZALKIN: I think the fact that she continued to
10 call the university --

11 THE COURT: What do you mean by the fact that she
12 continued to call --

13 MR. ZALKIN: There is confidential resources at first.
14 She gets raped. She calls the sexual violence hotline. That's
15 step No. 1.

16 THE COURT: As long as she knows that's not a report
17 for an investigation.

18 MR. ZALKIN: Right. But you are asking me to assess
19 whether or not she would have potentially participated in some
20 investigation.

21 THE COURT: No. I'm trying to find out what posture
22 the university was in when they were having communications with
23 her and what communications they had with her and what is the
24 basis for alleging that she sought them to do something to
25 either protect her from further injury or to alleviate her

1 situation, and she sought that kind of assistance from the
2 university and they denied her that assistance. That's the
3 first thing I'm trying to figure out. I can't see any place
4 before August 5 that she ever requested or took any steps to
5 initiate that kind of activity by the university. On August 5,
6 when she did do that, the university did respond.

7 MR. ZALKIN: My response to that, your Honor, is the
8 law doesn't put the burden on the victim to request or initiate
9 that response. It puts the burden on the university once they
10 obtain actual knowledge to put that response in motion. She is
11 not obligated to go to the university and say, I want you to
12 investigate.

13 THE COURT: What is the university's responsibility if
14 a person says, this is what happened to me, I don't want it
15 investigated, I don't want you to talk to me about it further.
16 I don't want you to talk to witnesses about it. I don't want
17 you to do anything about it. What is their obligation with
18 regard to that particular individual?

19 MR. ZALKIN: The only answer I have to that is to
20 respond in a way that's not clearly unreasonable.

21 THE COURT: What is unreasonable how they handled her?
22 Because she is the plaintiff and you want relief.

23 MR. ZALKIN: What I'm alleging is that it's
24 unreasonable to not train your first responders to sexual
25 violence on policies and procedures.

1 THE COURT: Where is that in this complaint? Is there
2 a paragraph --

3 MR. ZALKIN: Paragraph 32 to 33 and 34.

4 THE COURT: Inadequate information from the hotline?

5 MR. ZALKIN: Correct.

6 THE COURT: Which paragraph?

7 MR. ZALKIN: 32 through 34.

8 THE COURT: In 32, though, you do say that she was
9 advised that she could report her rape to the police.

10 MR. ZALKIN: That's not at issue.

11 THE COURT: What is the inadequate information that
12 they didn't have that she was seeking from them that's
13 reflected in paragraph 32?

14 MR. ZALKIN: I think what would be reasonable to
15 respond to, when someone says, what are my rights and options
16 under Title IX.

17 THE COURT: That's not what it says. You don't say in
18 this paragraph that she ever says, what are my rights and
19 options.

20 MR. ZALKIN: She asked what her resources were.

21 THE COURT: In paragraph 32?

22 MR. ZALKIN: 32 and 33.

23 THE COURT: I don't see that in 32. It says she
24 reported to them that she was raped, and they advised her that
25 she could report her rape to the police. That's what 32 says.

1 Doesn't say anything about any other adequate or inadequate
2 information or requests for information. In 33 it said she
3 requested of the nurse information about how to receive
4 academic and housing accommodations and that they didn't know
5 anything about academic and housing accommodations. That's
6 what 34 says.

7 MR. ZALKIN: That's what I'm referring to.

8 THE COURT: Why would the hotline necessarily know
9 what the options would be for academic and housing
10 accommodations?

11 MR. ZALKIN: Because those are necessarily the
12 accommodations that are made to victims of sexual assault under
13 Title IX.

14 THE COURT: Wasn't she aware of what those options
15 were? The option was exactly what she did. She went to her
16 academic advisor and she sought those accommodations from her
17 academic advisor.

18 MR. ZALKIN: Ultimately, yeah.

19 THE COURT: Ultimately meaning when?

20 MR. ZALKIN: I believe it was October 14.

21 THE COURT: The next day.

22 MR. ZALKIN: Yes.

23 THE COURT: Wait a minute. Think about what you just
24 said. You said the totally inadequate thing they did they did
25 on October 13 and 14. It was not explained to her what her

1 options were with regard to academic and housing accommodation.
2 And the very same day she calls up her academic advisor and
3 gets that information.

4 MR. ZALKIN: Yes.

5 THE COURT: How can you say that that's an inadequate
6 response?

7 MR. ZALKIN: What I'm saying, your Honor, is that the
8 failure to train the sexual assault hotline --

9 THE COURT: She wasn't deprived that information. She
10 is suing because she says she was deprived that information.

11 MR. ZALKIN: What she is suing, her claim is that the
12 school was deliberately indifferent.

13 THE COURT: But they weren't deliberately indifferent
14 to her on that issue because they not only gave her the
15 information, they gave her the accommodation, the very same
16 day, within 24 hours of her request.

17 MR. ZALKIN: She was fortunate enough to know to go to
18 her academic advisors.

19 THE COURT: Then she did not suffer an injury because
20 of their ignorance. That's not her personal claim, right,
21 under Title IX?

22 MR. ZALKIN: When you look at the claim holistically
23 it's, did this school act clearly and unreasonably --

24 THE COURT: Why should she recover as a result of that
25 if she was not damaged by that?

1 MR. ZALKIN: I think that probably goes to our first
2 cause of action, which is a general policy of indifference to
3 sexual misconduct on campus.

4 THE COURT: What is the facts that you give me that
5 show that there is a general indifference to assaults on
6 campus? What paragraphs do you lay that out?

7 MR. ZALKIN: Paragraphs 8 and 15, your Honor, we
8 allege, there have been close to 30 administrative complaints
9 filed by Columbia students with the department of education
10 each claiming Columbia failed --

11 THE COURT: Where are you reading from?

12 MR. ZALKIN: Paragraphs 8 and 15.

13 THE COURT: Which one did you just read?

14 MR. ZALKIN: Paragraph 8.

15 THE COURT: Paragraph 8 says: Among the key
16 allegations in these administrative complaints were accusations
17 against Columbia. You were relying on those accusations
18 against Columbia.

19 MR. ZALKIN: Yes. If I can back up, your Honor, and
20 talk about the case law interpreting this cause of action. In
21 *Tubbs*, your Honor, the Court found that there could be
22 preassault Title IX reliability where the university was aware
23 of the significant amount of sexual assaults on campus.

24 THE COURT: You don't have those facts here. Those
25 facts have not been established as to Columbia.

1 MR. ZALKIN: We have alleged that at least 30
2 individuals filed claims with the department of education
3 claiming that they were assaulted.

4 THE COURT: That's not what it says. Where does it
5 say that?

6 MR. ZALKIN: In my notes I have it at paragraph 8 and
7 paragraph 15.

8 THE COURT: Is that in this complaint? You say the
9 people have complained about certain things to the department
10 of education about Columbia.

11 MR. ZALKIN: Yes. We also added that Columbia is
12 under several OCR investigations.

13 THE COURT: You said those investigations in and of
14 itself.

15 MR. ZALKIN: They are being investigated for their
16 failure to comply with department of education guidelines in
17 response to sexual misconduct on campus. We say that Columbia
18 has pressured victims not to report their sexual misconduct.

19 THE COURT: I'm sorry. Where do you say that?

20 MR. ZALKIN: Again, in my notes I have it at
21 paragraphs 8 and 15.

22 THE COURT: Where in paragraph 8 or 15?

23 MR. ZALKIN: I don't have the complaint in front of
24 me, your Honor. I'm sorry.

25 THE COURT: I don't see it in 8. You say 15.

1 MR. ZALKIN: Yes.

2 THE COURT: 15 says: In the spring of 2015, Columbia
3 threatened student activists and journalists with suspension or
4 expulsion for handing out flyers to prospective students asking
5 for better sexual violence prevention education at Columbia.
6 Two students subsequently had to attend disciplinary meetings
7 where they were threatened with expulsion.

8 How does that make this Title IX sexual assault
9 responses to individual cases inappropriate?

10 MR. ZALKIN: I think my notes should reflect
11 paragraphs 8 through 15 because I think that's that whole
12 section with the heading that says Columbia's kind of general
13 misconduct or policy.

14 THE COURT: How do you characterize your independent
15 claim, as a what?

16 MR. ZALKIN: It is a claim that Columbia had a general
17 policy of indifference to sexual misconduct on campus.

18 THE COURT: How does she recover on that claim? What
19 are you asking for?

20 MR. ZALKIN: I think that the *Doe 1 v. Baylor* case
21 answers that question. And what the Court said in that case
22 was that this general policy of indifference creates a
23 heightened risk for sexual misconduct to occur. It effectively
24 creates a sexually hostile culture on campus.

25 THE COURT: You're extrapolating that they are

1 responsible for her having been raped.

2 MR. ZALKIN: Yes.

3 THE COURT: She is suing them for the rape injuries
4 because they didn't meet their obligations to her with regard
5 to preventing this rape?

6 MR. ZALKIN: With regard to complying with Title IX.

7 THE COURT: I don't know what you mean by complying
8 with Title IX. Either they are responsible for her assault or
9 they are not responsible for her assault under this theory. Is
10 that what you are saying, they are responsible for her assault
11 to the extent that they must pay her damages for her injuries?

12 MR. ZALKIN: They are responsible for creating a
13 sexually hostile environment in which sexual violence was
14 ignored.

15 THE COURT: Not in your case on those circumstances.
16 Nobody in those cases holds the institution responsible for the
17 rape because --

18 MR. ZALKIN: In both *Tubbs* and *Doe 1 v. Baylor*, the
19 courts did actually that.

20 THE COURT: Held them responsible for the rapes and
21 damages to the plaintiff?

22 MR. ZALKIN: They deny the defendant's motions to
23 dismiss on the exact same theory that we are offering here.

24 THE COURT: So you say that they have created some
25 environment that makes it more likely that students are going

1 to be raped?

2 MR. ZALKIN: Yes.

3 THE COURT: And you say that in the ways that are
4 alleged in paragraphs 8 through what?

5 MR. ZALKIN: Through 15.

6 If I could back up, your Honor, in the *Doe 1 v. Baylor*
7 case, under the same theory, the Court denied the defendant's
8 motion to dismiss where the plaintiff alleged that the school
9 misinformed victims about their rights under Title IX.

10 THE COURT: You don't have any allegation that
11 Columbia misinformed people.

12 MR. ZALKIN: No. And I'm not arguing that Columbia's
13 actions here exactly mirror the allegations in the other cases,
14 but what I'm saying is, we have alleged allegations similar in
15 nature such that this Court could also find that Columbia's
16 deficiencies created a sexually hostile culture on the campus
17 in violation --

18 THE COURT: That's a totally different claim. You
19 claim that they caused the rape is a different claim than they
20 didn't respond accurately under Title IX.

21 MR. ZALKIN: Two distinct theories of liability.

22 THE COURT: Not just two distinct theories of
23 liability. They are not even based on the same set of facts.

24 MR. ZALKIN: They are not based on the same set of
25 facts, no. One involves preassault conduct and a kind of

1 general policy argument. One involves specific actions
2 postknowledge --

3 THE COURT: You say at this point that your complaint
4 is sufficient to allege sexually hostile culture at the
5 university that makes them liable for her rape and, two, that
6 they violated Title IX and their obligations to her under Title
7 IX by not taking steps earlier than her request that they
8 investigate by not taking steps to investigate this when they
9 first became aware of her claim of having been assaulted in
10 October of 2015.

11 MR. ZALKIN: That's correct, your Honor. And we are
12 also arguing that their failure to adhere to the department of
13 education guidelines also supports the theory of liability.

14 THE COURT: Which theory of liability?

15 MR. ZALKIN: The one that they acted with deliberate
16 indifference to her specific report of sexual violence.

17 THE COURT: I'm trying to understand, when do you say
18 they acted with deliberate indifference?

19 MR. ZALKIN: From the point where --

20 THE COURT: From what date to what date?

21 MR. ZALKIN: From the point where reported it
22 initially to the sexual violence hotline to the point where
23 they concluded their investigation.

24 THE COURT: You are taking that beyond January 19. In
25 way were they indifferent to her circumstances after August 5

1 of 2016? They did an investigation. You don't say it was
2 anything inadequate --

3 MR. ZALKIN: They did an investigation, correct. Our
4 argument is, they should have done that investigation when they
5 first learned of her sexual assault. At that point there would
6 have been more resources available to them. They would have
7 had the security footage. More than likely, witnesses would
8 have had a fresher recollection in their mind.

9 THE COURT: You think that they had a responsibility
10 to do an investigation on January 20?

11 MR. ZALKIN: I think they had an ongoing
12 responsibility to respond beginning --

13 THE COURT: That's not my question. My question is,
14 on January 20, do you think that they had an obligation to
15 investigate?

16 MR. ZALKIN: Yes. They had an obligation to do
17 something. The reason I bring up the department of education
18 is because the department of education, their guidelines
19 actually say, even if the victim doesn't want to report or
20 wants to remain confidential, the school must still take all
21 reasonable steps --

22 THE COURT: What do you think would have been a
23 reasonable step? What else --

24 MR. ZALKIN: As I mentioned before, they could have
25 interviewed people in her dorm.

1 THE COURT: Even if she didn't want them interviewed?

2 MR. ZALKIN: Even if she didn't want them interviewed.

3 THE COURT: That's not respecting her confidentiality
4 if they are going to tell everybody in her dormitory that she
5 is a victim of a rape.

6 MR. ZALKIN: They don't have to necessarily say --

7 THE COURT: How can they ask them questions?

8 MR. ZALKIN: Did you see anything suspicious? Did you
9 hear anything suspicious? Has there been any stranger lurking
10 around this room?

11 THE COURT: She didn't provide them with any
12 information that anybody would have been able to give any such
13 information, did she?

14 MR. ZALKIN: She reported that she was raped in her
15 dorm. What I'm saying is --

16 THE COURT: They should have canvassed the dorm and
17 asked people what?

18 MR. ZALKIN: They could have taken some steps. They
19 could have looked at swipe logs at the time. They could have
20 seen if there was a student in the dorm that didn't live there.
21 They could have asked if there has been any suspicious people
22 in the dorm. They could have asked the resident advisor if the
23 resident advisor had seen anybody --

24 THE COURT: And you think that I should say and you
25 think there is case law to support the conclusion that they

1 should have done that even though she specifically asked them
2 not to do that?

3 MR. ZALKIN: The department of education says that.
4 And what the case law says is that failure to adhere to the
5 department of education's guidelines is some something that a
6 reasonable juror could look to and say, they didn't act
7 reasonably.

8 THE COURT: I guess part of it is my not understanding
9 the theory. If they didn't do these things and they didn't do
10 these things because she asked them not to do these things, how
11 were they liable to her? There may be somebody else out there
12 who might have a complaint about it, who wanted it
13 investigated, and it could have prevented some other incident
14 that might have happened. How are they liable to her as a
15 plaintiff if they did what she asked them to do?

16 MR. ZALKIN: Because the damage in a Title IX case is
17 the exposure to a sexually hostile environment. It is gender
18 discrimination --

19 THE COURT: You don't claim that she was exposed to a
20 sexually hostile environment after she reported it.

21 MR. ZALKIN: We do.

22 THE COURT: What type of hostile environment do you
23 allege that she was exposed to that she is suing for?

24 MR. ZALKIN: Her rapist was on the loose.

25 THE COURT: But she didn't want him caught. She

1 didn't say, investigate, go get the rapist. She said, don't do
2 it.

3 MR. ZALKIN: The reason she said don't do it --

4 THE COURT: There may be a very good reason, but that
5 doesn't mean that if she has a good reason that she doesn't
6 want them to investigate by them respecting that good reason
7 that they are somehow liable in damages because they did what
8 she asked them to do.

9 MR. ZALKIN: The reason the context is important is
10 because it ultimately got to the point where in her mind she
11 was throwing up her hands saying, these guys don't care about
12 anybody.

13 THE COURT: You know what the problem with that
14 argument is, that argument doesn't apply to any lawsuit.
15 That's not a justification. That doesn't change the law.
16 Because I say, well, don't drive me across the bridge because I
17 don't think you know how to drive. If you drive me off the
18 bridge into the water, it doesn't change what the claim is.
19 The claim is irrelevant to what her motivations were as to why
20 she asked them to take certain action and not take certain
21 action.

22 It would be one thing if you were saying that she
23 asked them to investigate this and they refused to investigate.
24 But it's more difficult for you to argue that she can sue them
25 if she asked them not to expose her this way in an

1 investigation. They did what she asked them to do.

2 And then you say to me now, well, the only reason she
3 asked them not to do it is because she thinks that they were
4 doing a terrible job. They may have been doing a terrible job.
5 But then you can't fault them for not doing a good job because
6 you told them not to do any job.

7 MR. ZALKIN: I understand that logic, your Honor.

8 THE COURT: Case law says that you can sue on that
9 basis or makes a difference whether you had a good reason or a
10 bad reason to tell them, don't investigate. If you tell them
11 don't investigate, they don't owe you an investigation, right?

12 MR. ZALKIN: Right. I'm unaware of any case law that
13 addresses that specific issue. I know that the department of
14 education explicitly says that the wishes of the victim, while
15 important, are not completely dispositive of a university's
16 decision to investigate or not.

17 I also know that the law does not place the onus on a
18 victim to ask the university to respond to a report. It puts
19 the onus on the university once they attain actual knowledge to
20 respond.

21 THE COURT: I understand.

22 Did you have anything quickly you want to respond? I
23 kept the court reporter over.

24 MR. ZALKIN: Thank you, your Honor.

25 MS. KAPLAN: Your Honor, subject to not torturing the

1 your court reporter further, I am going to be brief.

2 As your Honor has pointed out in your questioning,
3 there is a strong river of irony underlying plaintiff's theory
4 in this case. Plaintiff herself says in the documents we
5 submitted over and over again that she was an expert on
6 Columbia's policies. She concedes that she was a member of the
7 activist groups relating to these issues on campus and was
8 fully familiar with the resources available, the law, and the
9 obligations.

10 In our brief I noted that had Columbia overridden her
11 wishes and investigated anyway, she likely would have sued us
12 for doing that. But to put it another way, your Honor, if you
13 had posited to any student activist, like the plaintiff, at the
14 beginning of this case, when she first entered Columbia, that
15 Columbia in these circumstances should have overridden the
16 clear and express desires of the victim, they would have told
17 you you were insane. I talked about for the reasons cited in
18 our brief, underlying their policy, which is reflected in the
19 DOE is the utmost respect for the dignity and the
20 confidentiality and the wishes of victims, subject to certain
21 conditions that we talked about earlier.

22 Now, Exhibits 4 and 5, which I'll refer your Honor
23 to -- again, I'm trying to be sensitive here -- are the
24 contemporaneous communications of both the sexual violence call
25 on October 13 and the follow-up afterwards. And I would refer

1 your Honor on Exhibit 15 to the footnote at the bottom that has
2 two little stars on it. I'm not going to read it into the
3 record, but it explains quite well, I believe, exactly what was
4 going on. And in the transcript of the call, the sexual
5 violence hotline there are repeated references throughout on
6 page 3, on page 5 about her insistence about not reporting.

7 Moreover, I want to clarify one point that came up in
8 your conversation with my friend here. There is no evidence in
9 the record anywhere that plaintiff told anyone that the alleged
10 assault had happened in her dorm room until she formally
11 reported in the summer. Indeed, if you look at the paragraph
12 in the complaint that talks about the student forum with the
13 executive vice-president of University Life, she alleges at
14 paragraph 44 that she shared that she had been raped, but she
15 does not allege that she shared that she had been raped in her
16 dorm room. And in all the exhibits we submitted anywhere else
17 there is no allegation that plaintiff specified anything about
18 her dorm room until she formally reported later in the summer.

19 With respect to the meeting with the executive
20 vice-president of life, I'll refer your Honor again to
21 Columbia's policies about student advocacy forums, as well as
22 the DOE guidelines on that, both of which expressly limit and
23 exclude those forums from official reporting obligations.

24 As your Honor pointed out with respect to the contact
25 in January, in January, again, there is kind of a causation

1 problem.

2 In my spare time, as your Honor probably knows, I
3 practice securities law, and in securities law there is this
4 concept of very complicated concepts of but for and proximate
5 causation. Here, given the fact that in January she told
6 Columbia she didn't want there to be an investigation, she
7 wouldn't cooperate and don't contact her, it is hard to see,
8 even if it wasn't a student advocacy form, which it is, what
9 sort of damages she could have sustained from the failure of
10 Columbia to contact her until later in January.

11 Finally, your Honor, with respect to the preassault
12 theory, I want to correct myself. I think I might have said
13 that those cases or that the law there hinge on an allegation
14 of general culture of indifference. That's not correct. If I
15 said it, I'm correcting myself.

16 The few cases that have upheld such a theory say that
17 they are limited to extreme situations. I am going to refer
18 your Honor and your law clerk to cases that we cite -- of
19 course I am very explicit about that -- to extreme cases where
20 there is a situation where there truly is a sexually hostile
21 culture on campus. Again, the examples are the football player
22 ambassador program where girls were encouraged to kind of give
23 football player recruits a good time, the situation at Baylor
24 that led to the resignation of Kenneth Starr as president of
25 Baylor and situations like that.

1 As your Honor pointed out in your exchanges with my
2 friend, there is nothing in this complaint that comes close to
3 those kinds of allegations about Columbia. The fact that
4 students raised allegations is very different even in the *Tubbs*
5 case where not only were there allegations, but there were
6 filings by the DOE of these issues. SUNY said it would respond
7 and would ameliorate those findings and then it did nothing.
8 Here there has been no findings, nothing even close. You can't
9 come close to a sexually hostile culture claim.

10 And with that, your Honor, I'm done.

11 THE COURT: Thank you.

12 I am going to get back to the papers and look at the
13 complaint further. Hopefully I'll get you a decision in the
14 next 30 to 60 days.

15 o0o